Supreme Court, U.S.
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No. 10-160

IN THE

Supreme Court of the United States

KRISTEN BAUM,
Petitioner,

v.

ASTRAZENECA LP,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. As required by Pennsylvania law, the court of appeals in this case applied federal regulations promulgated pursuant to the Fair Labor Standards Act to interpret the parallel Pennsylvania Minimum Wage Act. In doing so, did the court of appeals err in disregarding and deciding contrary to the Secretary of Labor's interpretations of those federal regulations, which are entitled to controlling deference under *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905 (1997) and which another circuit's court of appeals adopted as controlling under materially indistinguishable facts in *In re Novartis Wage and Hour Litigation*,— F.3d—, 2010 WL 2667337 (2nd Cir., July 6, 2010)?

2. Is petitioner outside of the administrative and outside sales exemptions of the Pennsylvania Minimum Wage Act?

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PETITION FOR A WRIT OF CERTIORARI

Kristin Baum respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The order of the Court of Appeals for the Third Circuit denying the petition for rehearing *en banc* is unreported and is reprinted in Appendix ("App.") A at 1a. The opinion of the Court of Appeals for the Third Circuit affirming the District Court for the Western District of Pennsylvania's award of summary judgment to respondent, which was filed on March 24, 2010 (App. B, 3a-11a), and also re-filed subsequent to denial of the petition for rehearing *en banc* on May

10, 2010 (App. C, 12a-20a) is unreported. The opinion of the District Court for the Western District of Pennsylvania granting respondents' motion for summary judgment (App. D, 21a-58a) is reported at 605 F.Supp.2d 669.

JURISDICTION

The judgment of the court of appeals affirming the district court was entered on March 24, 2010. The decision of the court of appeals denying the petition for panel rehearing and rehearing *en banc* was entered on April 30, 2010. The judgment of the court of appeals affirming the district court was re-entered on May 10, 2010, and the mandate was issued. Following the decision on July 6, 2010 by the Second Circuit in *In Re Novartis Wage and Hour Litigation*, — F.3d —, 2010 WL 2667337 (2nd Cir., July 6, 2010), Petitioner filed a motion to recall the mandate, extend time to file motion to reconsider, and reconsider opinion denying Petitioner relief. That motion is presently pending before the Court of Appeals for the Third Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Pennsylvania Minimum Wage Act of 1968 (MWA), 43 Pa. Cons. Stat. § 333.105(a) provides:

> (a) Employment in the following classifications shall be exempt from both the minimum wage and overtime provisions of this act: . . .
>
> > (5) In a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools) or in the capacity of outside

> salesman (as such terms are defined and delimited from time to time by regulations of the secretary, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his or her workweek which he or she devotes to activities not directly or closely related to the performance of executive administrative activities, if less than forty percent of his or her hours worked in the workweek are devoted to such activities);

REGULATORY PROVISIONS INVOLVED

The PMWA "Administrative" exemption, at 34 Pa. Code § 231.83, the PMWA "Outside Salesman" exemption at 34 Pa. Code § 283.85, and the federal definitions of "discretion and independent judgment" (29 C.F.R. § 541.202), "making sales or obtaining orders," (29 C.F.R. § 541.501) and "promotion work" (29 C.F.R. § 541.503) are set forth in Appendix F, *infra*, at App. 61a through 68a.

STATEMENT

This case is one of multiple factually-similar cases brought in the federal courts, including another action against Respondent AstraZeneca LP ("AstraZeneca"), which seek overtime pay on behalf of the pharmaceutical representatives who promote drugs to doctors. Pharmaceutical companies have defended against these suits by contending that pharmaceutical representatives are exempt outside sales or administrative employees under state law and/or the Fair Labor Standards Act of 1938 (FLSA),

29 U.S.C. §§ 201 *et seq*. In addition to the instant litigation, several other cases seeking determinations of whether pharmaceutical representatives are entitled to overtime pay have reached the courts of appeals.[1]

In October 2009, the Secretary of the Department of Labor (DOL) filed an *amicus* brief in the *In Re Novartis Wage and Hour Litigation* case that was then pending before the Second Circuit, in which the Secretary interpreted the federal regulations for outside sales and administrative exemptions as applied to pharmaceutical representatives. (*See* App. G, 69a to 94a) As explained by the Secretary in the *amicus* brief, pharmaceutical representatives do not come within the outside sales exemption as they do not make sales within the meaning of the federal implementing regulations, nor do they qualify for the administrative exemption to the FLSA as they lack "discretion and independent judgment" as that term has been defined and delimited by federal regulations. The Secretary's reasonable and considered interpretation of her own regulations is entitled to controlling deference under this Court's decision in *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905 (1997). The Second Circuit in *Novartis* agreed and in its opinion issued on July 6, 2010 adopted the Secretary's interpretation as controlling, finding neither the outside sales or administrative exemptions applied to pharmaceutical representatives with

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[1] *See Brody v. AstraZeneca Pharmaceuticals LP*, No. 08-56120 (9th Cir.); *In Re Novartis Wage and Hour Litig.*, No. 09-0437 (2nd Cir.) *D'Este v. Bayer Corp.*, No. 07-56577 (9th Cir.); *Menes v. Roche*, No. 08-55286 (9th Cir.); *Barnick v. Wyeth*, No. 07-56684 (9th Cir.); *Kuzinski v. Schering Corp.*, No. 09-1945 (2nd Cir.); and *Smith v. Johnson and Johnson*, Nos. 09-1223, 09-1292 (3rd Cir.)

materially indistinguishable job duties from those of Baum in this case. *In re Novartis Wage and Hour Litigation*, — F.3d —, 2010 WL 2667337 (2nd Cir., July 6, 2010).

While Petitioner's claims in this case arise under the Pennsylvania Minimum Wage Act (PMWA) rather than the FLSA, her claims depend upon the meaning of the federal regulations implementing the sales and administrative exemptions to the FLSA.[2] As both the district court and the court of appeals acknowledged, Pennsylvania looks to federal regulations to interpret the parallel PMWA exemptions. (*See* App. C, 16a n.4; *see* App. D, 28a)

After the district court awarded summary judgment to AstraZeneca, finding Petitioner to be exempt under the outside sales exemption to the PMWA, she timely appealed to the court of appeals. In connection with her appeal, Petitioner submitted the Secretary's *amicus* brief as controlling authority on the meaning and requirements of the federal regulations. Notwithstanding this Court's clear directive in *Auer* that the Secretary's considered interpretation of her own regulations is entitled to controlling deference, the court of appeals applied the federal regulations to interpret the PMWA administrative exemption without mentioning, much less deferring to, the Secre-

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[2] Under Pennsylvania law, it has long been recognized that there is an "identity of purpose" between the FLSA and the PMWA, and that "it is proper to give deference to federal interpretation of a federal statute when the state statute substantially parallels it." *Commonwealth of Pennsylvania Dept. of Labor and Indus., Bureau of Labor Law Compliance v. Stuber*, 822 A.2d 870, 873 (Pa. Commw. Ct. 2003), *aff'd*, 580 Pa. 66, 859 A.2d 1253 (Pa. 2004).

tary's authoritative interpretation. (*See* App. C, 12a to 20a)

The Third Circuit's failure to heed this Court's controlling precedent in *Auer* has already created a split in the circuits as the Second Circuit in *Novartis* applying *Auer* under materially indistinguishable facts reached the opposite result, has resulted in a situation where inconsistent treatment of pharmaceutical representatives with identical job duties is inevitable, and has, simply, gotten this issue wrong on the merits. All of these reasons militate in favor of the grant of a writ of certiorari.

a. Factual Background

Kristen Baum was employed by AstraZeneca as a "Pharmaceutical Sales Specialist" ("PSS") from May 1, 2003 until November 1, 2006. As a PSS, Baum did not sell anything or promote her own sales. Her job was to promote AstraZeneca's pharmaceuticals generally through contact with doctors in an assigned territory. She promoted AstraZeneca's cardiovascular drugs. Doctors did not buy anything from AstraZeneca or Baum. Nor did they bind others to buy anything. Instead, AstraZeneca's sales occurred through contracts negotiated with wholesalers and large retailers.

During her employment, Baum's interactions with physicians (and those of all PSSs) were stringently controlled by AstraZeneca and by federal law. Baum was required to make promotional calls to physicians from an assigned list each day. When she was on such promotional calls, her presentation was scripted line-by-line. She was given a scripted answer for each question a doctor would be anticipated to ask. If she was asked a question, she was required to

provide the scripted answer. She was also given scripted questions to ask the physicians. If she was asked an off-label question or a question outside the script about the product, she was not permitted to answer and instead was required to put in a professional information request to AstraZeneca, and the physician would receive an answer directly from AstraZeneca's headquarters without Baum's involvement. In fact, federal law made it a criminal offense for Baum or other non-physicians to talk off-label.

AstraZeneca also strictly controlled the methods that were used to present its products. AstraZeneca provided Baum and other PSSs two or three page CVAs containing product information and approximately seven clinical articles on each product, as well as core visual aids to use in promoting that product. All materials used by Baum and other PSSs in promotion of AstraZeneca's drugs had to be "eSTAR" approved by the company, meaning they had to comply with federal law and the company's "Standards for Engaging in Product Promotion." AstraZeneca forbade PSSs from highlighting, marking, or otherwise altering the eSTAR-approved materials in any way or using unauthorized materials.

AstraZeneca provided several other tools that it trained PSSs to use; but, again, the use of these tools was stringently controlled. Baum was trained to supply food in order to gain access to physicians and their staff ("access meals"). However, AstraZeneca gave Baum instructions on how much she could spend per meal, how many people she could feed, and where she could go. Baum could request that AstraZeneca authorize use of a "promotional approved speaker" or a peer-to-peer meeting to provide

additional information for a physician who had expressed interest. However, AstraZeneca controlled all choices to be made in implementing those requests.

Although Baum and other PSSs neither made sales nor exercised discretion and independent judgment with respect to company policy, or other matters of significance, AstraZeneca treated them as exempt employees and did not pay overtime wages for their hours worked in excess of 40 hours per week.

b. Proceedings Below

1. The District Court

On March 27, 2007, Baum filed this action in the Court of Common Pleas of Westmoreland County, Pennsylvania. The case was filed as a class action pursuant to Pa.R.Civ.P. §1701, and sought damages for unpaid overtime compensation pursuant to the PMWA, 43 Pa. C.S.A. §§ 333.101-333.115 and the Pennsylvania Wage Payment and Collection Law, 43 Pa. C.S.A. §§ 260.1-260.10. In her complaint, Baum defined the prospective class as all individuals who worked as PSSs for AstraZeneca in Pennsylvania beginning March 27, 2004.

On April 20, 2007, AstraZeneca removed the case to the United States District Court for the Western District of Pennsylvania - Johnstown Division. On August 17, 2007, Baum filed an amended class action complaint asserting the same allegations and claims referenced above. AstraZeneca filed an answer to the amended class action complaint alleging that Baum and all similarly situated employees of AstraZeneca were exempt from the overtime provisions of the PMWA pursuant to the administrative exemption provided in 34 Pa. Code § 231.83 and the outside

sales exemption at 34 Pa. Code § 283.85. On March 28, 2008, AstraZeneca filed a motion for summary judgment. Baum filed her response to AstraZeneca's motion for summary judgment on May 9, 2008. AstraZeneca filed its reply on May 23, 2008.

By Memorandum Opinion and Order dated March 31, 2009, the district court granted AstraZeneca's motion for summary judgment. (*See* App. D, 22a) The district court, which did not have the benefit of the Secretary's *amicus* brief, recognized that it is proper under Pennsylvania law to look to federal regulations to interpret the PMWA, (*id.*, at 28a to 29a) and cited federal guidance on the FLSA sales exemption regulations, (*see id.* at 43a) but ultimately concluded that Baum was exempt from overtime compensation pursuant to the outside sales exemption of the PMWA. (*Id.* at 46a, 54a) In dicta, the district court also stated it would "likely find" Baum to be exempt from overtime compensation pursuant to the administrative exemption of the PMWA. (*Id.* at 55a)

The district court denied Baum's pending motion for class certification as moot based on its summary judgment dismissal. A final judgment was entered on March 31, 2009, dismissing Baum's and all putative class members' claims. On April 9, 2009, the district court modified its March 31, 2009 final judgment to make it clear that only a final judgment dismissing Baum's claims with prejudice had been entered and that no judgment had been entered binding putative class members. (App. E, 59a to 60a) Baum timely appealed.

2. The Secretary's *Amicus* Brief

After Baum filed her notice of appeal to the Third Circuit, the Secretary of Labor submitted her *amicus* brief in the *Novartis* case on October 13, 2009. (*See* App. G, 69a to 94a) Baum submitted the Secretary's *amicus* brief filed in *Novartis* to the Third Circuit in this case. (*See* App. H, 95a to 97a)

The facts in *Novartis* are indistinguishable in all pertinent respects from the facts in this case; AstraZeneca pharmaceutical representatives have the same job duties and are subject to the same types of controls and limitations on discretion and independent judgment as the Novartis pharmaceutical representatives considered by the Secretary in the *amicus* brief. (*Compare* App. G, 69a to 94a, discussing and applying facts in *Novartis* to the facts found by the district court in its memorandum opinion granting summary judgment to AstraZeneca at App. D, 22a to 27a).

As reflected in the *amicus* brief, the Secretary of Labor interpreted the FLSA administrative and outside sales exemptions, and in her considered and reasonable opinion, neither exemption applies to pharmaceutical representatives. (*See* App. G, 73a to 94a)

The Secretary found the "outside sales exemption" did not apply since pharmaceutical representatives did not sell anything and only promoted products to doctors who did not buy anything and could not bind others to buy anything. (*See Id.*, 74a to 83a)

The DOL also determined that pharmaceutical company representatives did not meet the regulatory requirements for the administrative exemption, as an employee's "exercise of discretion and independent

judgment" must be "with respect to matters of significance" in order for that employee to constitute an exempt administrative employee. *See* 29 C.F.R. § 541.202 (defining "discretion and independent judgment" for FLSA). As the Secretary of Labor explained in her *amicus* brief:

> within the stringent restrictions on Reps' work activities, the Reps' discretion is limited to such matters as what time of day to visit a particular doctor, the manner in which to approach the doctor based on the doctor's personality, and how best to deliver (*i.e.*, to "fit in") the [employer's] "core message" for a particular drug given the time constraints of a visit . . . They therefore should not be deemed to exercise discretion and independent judgment regarding matters of significance.

(App. G, 92a to 93a)

3. The Court Of Appeals For The Third Circuit

On appeal, the court of appeals did not adopt the reasoning of the district court, but instead affirmed the district court's decision on the alternate ground that Baum fell within the administrative exemption to the PMWA. (*See* App. C, 16a n.5)

The court of appeals specifically recognized that: "According to the Pennsylvania courts, 'it is proper to give deference to federal interpretation of a federal statute when the state statute substantially parallels it.'" (*Id.* at 16a n.4, citing *Commonwealth of Pennsylvania Dept. of Labor and Indus., Bureau of Labor Law Compliance v. Stuber*, 822 A.2d 870, 873 (Pa. Commw. Ct. 2003), *aff'd*, 580 Pa. 66, 859 A.2d 1253

(Pa. 2004)). The court of appeals therefore applied the federal regulations promulgated pursuant to the FLSA administrative exemption, and in particular 29 C.F.R. § 541.202 (defining "discretion and independent judgment"), to interpret the PMWA administrative exemption. (*See* App. C, 17a to 18a, citing federal code sections 29 C.F.R. §§ 541.202(a) and (c))

Inexplicably, although the court of appeals applied federal regulations to interpret the PMWA's administrative exemption, the court of appeals completely disregarded the DOL's controlling interpretation of those regulations which had been submitted by Petitioner. (*See* App. C, 12a to 20a; App. H, 95a to 97a) There is no mention of the Secretary's interpretation, or this Court's binding precedent in *Auer,* in the court of appeals' opinion. (*See* App. C., 12a to 20a)

Instead, the court of appeals relied upon a decision issued in February 2010 by a separate Third Circuit panel, which affirmed a district court opinion determining that pharmaceutical representatives employed by Johnson and Johnson were not within the FLSA's sales exemption but were within the FLSA's administrative exemption, and dismissing their FLSA claims for overtime pay accordingly. (*See* App. C, 18a, citing *Smith v. Johnson and Johnson*, 593 F.3d 280 (3rd Cir. 2010))

Notably, the Secretary's *amicus* brief was also raised as controlling authority by the plaintiff-appellant in *Smith*. (*See* App. I, 98a to 100a)) However, the Third Circuit did not address that argument in its published opinion or acknowledge that the Secretary's interpretation of the federal regulations was entitled to deference under this Court's precedent in *Auer*. *See Smith*, 593 F.3d at 280-286.

As a result, within the Third Circuit, both federal and PMWA claims by pharmaceutical representatives for overtime pay have been effectively foreclosed. The Third Circuit has also placed itself squarely at odds with the Second Circuit in *Novartis* applying *Auer* and the Secretary's interpretation in a materially indistinguishable case to find those pharmaceutical representatives non-exempt and entitled to overtime pay.

REASONS FOR GRANTING THE PETITION

a. The Court Of Appeals' Decision Contravenes This Court's Binding Precedent

It is well established under this Court's jurisprudence that the Secretary of Labor's interpretation of her own regulation is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer*, 519 U.S. at 461, 117 S.Ct. at 911 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989)). The fact that the Secretary's interpretation may come in the form of an *amicus* brief does not make it unworthy of deference. *Auer,* 519 U.S. at 462, 117 S.Ct. at 912 (controlling deference to legal brief). As this Court explained in the context of a similar dispute over the interpretation of the FLSA's administrative, professional, and executive regulatory exemptions in *Auer*:

> Petitioners complain that the Secretary's interpretation comes to us in the form of a legal brief; but that does not, in the circumstances of this case, make it unworthy of deference. The Secretary's position is in no sense a 'post hoc rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack, *Bowen*

> *v. Georgetown Univ. Hospital*, 488 U.S. 204, 212, 109 S.Ct. 468, 474, 102 L.Ed.2d 493 (1988). There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.

519 U.S. at 462, 117 S.Ct. at 912. Here, as in *Auer*, there is no evidence that the interpretation of the outside sales and administrative exemptions offered by the Secretary of Labor is not "the agency's fair and considered judgment." (*Id.*) Thus, the Secretary's interpretation offered in the *Novartis amicus* brief is entitled to controlling deference with respect to meaning and requirements of the regulations as applied to pharmaceutical representatives with materially indistinguishable job duties. This is particular applicable to the interpretation of the exemptions under the PMWA here since Pennsylvania courts defer to the interpretation of the FLSA exemptions. *Stuber*, 822 A.2d at 873 ("it is proper to give deference to federal interpretation of a federal statute when the state statute substantially parallels it").

Notwithstanding the above, and although Petitioner identified *Auer* as binding precedent that required the court of appeals to defer to the Secretary's interpretation in applying federal regulations to the PMWA (*see* App. H, 95a to 97a), the Third Circuit failed to consider whether the Secretary's interpretation was controlling under *Auer*. (*See* App. C, 12a to 20a) The court of appeals' opinion is entirely devoid of such discussion. *(See id.)*

Nor is there any evidence in the opinion to suggest that the court of appeals deferred to the Secretary's interpretation. References to the Secretary's *amicus* brief are conspicuously absent from the court of

appeals' opinion. (*See id.*) Further, although the court of appeals cited portions of the federal regulations defining "discretion and independent judgment" (*see id.*, 17a to 18a) the court of appeals did not address the Secretary's main contentions in the *amicus* brief that pharmaceutical representatives do not have sufficient discretion or independent judgment over important matters (*e.g.*, committing the resources of the business, making company policy, etc.) to satisfy 29 C.F.R. § 541.202, and therefore cannot qualify for exemption.

Given that the court of appeals was required under Pennsylvania law to, and did in fact, apply federal regulations to interpret the PMWA administrative exemption, the court of appeals should have deferred to the Secretary's interpretation of whether the type of limited discretion available to Baum (which is nearly identical to and materially indistinguishable from that available to the Novartis representatives), was sufficient to satisfy the requirement that an employee exercise "discretion and independent judgment with respect to matters of significance." (*See* App. F, 63a to 66a, reprinting federal regulation 29 C.F.R. § 541.202)

The court of appeals' failure to defer to the Secretary's interpretation contravened well-established precedent by this Court, and amounts to clear error of law. As the Third Circuit has refused to reconsider its decision, (and will likely deny Petitioner's additional, pending motion to reconsider)[3] remedy by this Court is necessary.

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[3] On May 10, 2010, the Third Circuit denied Petitioner's motion for rehearing *en banc* or panel rehearing, and issued the mandate in this case. Following the decision on July 6, 2010 by

b. The Court Of Appeals' Decision Creates A Direct Conflict With Decisions Of Other Courts Of Appeals

The Third Circuit's departure from this Court's established precedent in *Auer* has already resulted in a schism between the Second Circuit and Third Circuit courts of appeals.[4] (*See* App C., 12a to 20a (Opinion of the Third Circuit in this case finding pharmaceutical representatives to be exempt administrative employees); *compare In re Novartis Wage and Hour Litig.*, — F.3d —, 2010 WL 2667337 (2nd Cir., July 6, 2010) ("we conclude that the Secretary's regulations define and delimit the terms used in the statute; that under those regulations as interpreted by the Secretary, the Reps are not outside salesmen or administrative employees; and that the Secretary's interpretations are entitled to 'controlling' deference")).

In *Novartis*, the Second Circuit considered consolidated class claims for overtime pay under the FLSA, California and New York state law by pharmaceutical representatives employed by Novartis Pharmaceutical Corporation. *See id.*

In contrast to the Third Circuit's opinion in this case, the Second Circuit engaged in a thorough and

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the Second Circuit in *Novartis*, Petitioner filed a motion to recall the mandate, extend time to file motion to reconsider, and reconsider opinion denying Petitioner relief. That motion is presently pending.

[4] Given that this schism is the result of the Third Circuit's failure to follow binding precedent, it is a predictable result that the Third Circuit's position will become the minority position as other courts of appeals render decisions in accordance with this Court's direction in *Auer*.

careful analysis of *Auer's* applicability, as well as the limited exception set forth in *Gonzales v. Oregon*, 546 U.S. 243, 126 S.Ct. 904 (2006), and ultimately determined that the Secretary of Labor's interpretations of the outside sales and administrative exemptions are entitled to controlling deference. *See Novartis*, — F.3d —, 2010 WL 2667337, at *7-11, *13-14. *See also Jirak v. Abbott Laboratories*, — F.Supp.2d —, 2010 WL 2331098, *5-6 (N.D.Ill. June 10, 2010) (finding Secretary's interpretation entitled to deference under *Auer*; awarding summary judgment to pharmaceutical representtatives on overtime pay claims).

After determining that the Secretary's interpretation of the outside sales exemption was entitled to controlling deference, the Second Circuit went on to explain:

> Although Novartis contends that the position taken by the Secretary as *amicus* on this appeal is contrary to the regulations, we disagree. The basic premise of the regulations explaining who may properly be considered an exempt "outside salesman"-a term for which the FLSA explicitly relies on the Secretary to promulgate defining and delimiting regulations-is that an employee is not an outside salesman unless he does "in some sense make the sales," 2004 Final Rule at 22162. And although that phrase (on which Novartis relies heavily (*see, e.g.*, Novartis brief on appeal at 12, 22, 25, 29)) does not appear in any of the regulations that explicate the term "outside salesman," the regulations quoted above make it clear that a person who merely promotes a product that will be sold by another person does not, in any sense intended by the regulations, make the sale. The position taken by the Secretary on

> this appeal is that when an employee promotes to a physician a pharmaceutical that may thereafter be purchased by a patient from a pharmacy if the physician-who cannot lawfully give a binding commitment to do so-prescribes it, the employee does not in any sense make the sale. Thus, the interpretation of the regulations given by the Secretary in her position as *amicus* on this appeal is entirely consistent with the regulations.

Novartis, 2010 WL 2667337, *11.

Similarly, with respect to the administrative exemption, the Second Circuit also deferred to the Secretary of Labor's reasonable and reasoned interpretation:

> The Secretary points out that the regulations make clear that the requirement for authority to "exercise . . . discretion and independent judgment" means more than simply the need to use skill in applying well-established techniques or procedures prescribed by the employer, *see* 29 C.F.R. § 541.202(e). The Secretary takes the position that for the administrative exemption to apply to the Reps, the regulations require a showing of a greater degree of discretion, and more authority to use independent judgment in matters of significance, than Novartis allows the Reps. Again we find it appropriate to defer to the Secretary's interpretation.

Novartis, 2010 WL 2667337 at *14.

As the *Novartis* case reflects, the Third Circuit should have been guided by *Auer*'s holding, should have analyzed whether deference was appropriate, and, ultimately, should have deferred to the Secre-

tary of Labor's interpretations of her own regulations when it applied them. As this Court has previously explained, even where another construction of the regulations is reasonable, the Secretary of Labor is entitled to "resolve ambiguities" in her own regulations, and that interpretation is to be accorded controlling deference so long as it is not plainly erroneous or inconsistent with those regulations. *Auer*, 519 U.S. at 462, 117 S.Ct. at 912.

The Third Circuit's precedent disregarding *Auer* will inevitably result in this Circuit's decisions being aberrant and out-of-step as other courts follow this Court's binding precedent and recognize that the Secretary's interpretation is entitled to controlling deference.[5]

There are presently at least four factually-similar cases seeking overtime pay against pharmaceutical companies on appeal to the Ninth Circuit, all of which will now have the benefit of both the Secretary's interpretation and the Second Circuit's analysis in *Novartis*. *See Brody v. AstraZeneca Pharmaceuticals LP*, No. 08-56120 (9th Cir.); *D'Este v. Bayer Corp.*, No. 07-56577 (9th Cir.); *Menes v. Roche*, No. 08-55286 (9th Cir.); *Barnick v. Wyeth*, No. 07-56684 (9th Cir.). Further, even before the *Novartis* decision was issued by the Second Circuit, at least one district court had already recognized that the Secretary's recently filed *amicus* brief in *Novartis* was entitled to

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[5] Even without the benefit of the Secretary's interpretation in the *amicus* brief, multiple district courts have held in the past two years that pharmaceutical representatives do not come within the exemptions to the FLSA. *See Kuzinski v. Schering Corp.*, 604 F.Supp.2d 385, 402-03 (D.Conn.2009); *Ruggeri v. Boehringer Ingelheim Pharms., Inc.*, 585 F.Supp.2d 254, 272 (D.Conn.2008).

controlling deference under *Auer*. *See Jirak*, 2010 WL 2331098, at *6, *9-10 (recognizing Secretary's interpretation as controlling; refusing to follow Third Circuit precedent). Similar to the *Novartis* decision that would be issued by the Second Circuit a few weeks later, in *Jirak*, the District Court for the Northern District of Illinois performed a careful analysis of whether the Secretary's interpretation was entitled to controlling deference. *See id.* After concluding that "the DOL's interpretation is both persuasive and consistent with our analysis of the regulations" (*id.* at *6, *10) the district court awarded summary judgment to plaintiffs on their claims and denied defendant summary judgment (*id.* at *10).

As these cases reflect, it is extremely likely that the issue of applicability of the outside sales and administrative exemptions to pharmaceutical representatives will be decided consistent with *Novartis* in several other Circuits in the near future, leaving the Third Circuit increasingly out-of-step with its sister courts of appeals.

c. The Court Of Appeals' Decision Has and Will Continue to Result In Inconsistent Treatment of Identically-Situated Employees

The Third Circuit's failure in this case and in *Smith* to consider the Secretary of Labor's interpretation of the regulatory exemptions has effectively foreclosed relief for pharmaceutical representatives in the Third Circuit under both the FLSA and the PMWA, despite the merits of their claims under federal and state law. *See, e.g., Jackson v. Alpharma, Inc.*, 2010 WL 2869530, *5 (D.N.J. July 19, 2010) (refusing to consider *Novartis* and *Jirak* or perform

the analysis required by *Auer* in light of Third Circuit precedent; dismissing pharmaceutical representatives FLSA claims). Moreover, the Third Circuit's decisions in this case and *Smith* will inevitably result in different treatment of pharmaceutical representatives who are employed within and outside of the Third Circuit by pharmaceutical companies, unless and until this Court takes up this issue.

CONCLUSION

For the reasons stated, the Court should grant the petition.

Respectfully submitted,

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July 28, 2010

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-2150

KRISTEN BAUM, on behalf of herself and all others similarly situated,

Appellant

v.

ASTRAZENECA LP (also known as AstraZeneca Pharmaceuticals, LP or Astra-Zeneca, Inc.)

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge,
SLOVITER, McKEE, RENDELL,

BARRY, AMBRO, FUENTES,
SMITH, FISHER, CHAGARES,

JORDAN, HARDIMAN, and GREENAWAY
Circuit Judges,

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the

petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ D. Brooks Smith
Circuit Judge

Dated: April 30, 2010

tmk/cc: Joseph E. Fieschko, Esq.
Joseph N. Kravec, Jr., Esq.
John R. Linkosky, Esq.
Harry I. Johnson, III, Esq.
Matthew W. Lampe, Esq.
James S. Urban, Esq.

APPENDIX B

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-2150

KRISTEN BAUM, on behalf of herself and all others similarly situated,

Appellant

v.

ASTRAZENECA LP (also known as AstraZeneca Pharmaceuticals, LP or Astra-Zeneca, Inc.)

On Appeal from the United States District Court
for the Western District of Pennsylvania
District Court No. 3-07-cv-00090
District Judge: The Honorable Kim R. Gibson

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
January 14, 2010

Before: SCIRICA, *Chief Judge*, BARRY, and SMITH, *Circuit Judges*

(Filed: March 24, 2010)

OPINION

SMITH, *Circuit Judge*.

Kristin Baum appeals the District Court's entry of summary judgment in favor of AstraZeneca, her former employer. Baum sought relief under the Pennsylvania Minimum Wage Act ("PMWA"), 43 Pa. Cons.Stat. § 333.101 *et seq.*, based on AstraZeneca's purported failure to pay her for overtime work. The District Court concluded that Baum fell under the outside salesperson exemption of the PMWA, *id.* § 333.105(a)(5), and entered summary judgment in favor of AstraZeneca.[1] We will affirm on different grounds.

I.

Facts

Baum worked as a Pharmaceutical Sales Specialist ("PSS") for AstraZeneca from May 1, 2003, to November 1, 2006.[2] As a PSS, Baum promoted AstraZeneca pharmaceuticals directly to physicians. She regularly visited approximately 150 physicians in her assigned territory, answering questions about AstraZeneca products, building relationships with physicians and their staffs, and trying to get physicians to commit to prescribing AstraZeneca products. Because company policy, federal regulations, and federal laws controlled the scope and nature of Baum's interactions with physicians, AstraZeneca trained her on how to conduct a physician visit. Some of Baum's interactions with physicians were "canned speeches" she learned through AstraZeneca's in-house training.

---

[1] We have jurisdiction under 28 U.S.C. § 1291. The District Court exercised jurisdiction under 28 U.S.C. § 1332.

[2] Because we write only for the parties, we will presume knowledge of the record and recount the facts only briefly.

To gain access to physicians, Baum would, among other things, schedule "access meals" where she would provide breakfast, lunch, or dinner to a physician, the physician's staff, or both. These meals provided Baum opportunities to promote AstraZeneca products to physicians and their staffs. Baum also set up "prep" programs where physicians, some of whom were selected by her, addressed other physicians on medical topics. In the same vein, Baum arranged peer-to-peer meetings where physicians selected by AstraZeneca would meet with other physicians.

Baum normally worked sixty to seventy hours per week. She called on eight or nine physicians a day, amounting to ten to twelve hours a day in the field. On top of her field work, Baum spent approximately an hour each day checking e-mails, filling out expense reports, and working on spreadsheets. Baum's base salary was $63,000.

Procedural History

Baum filed suit against AstraZeneca on March 27, 2007, in the Court of Common Pleas of Westmoreland County, Pennsylvania. On April 20, 2007, AstraZeneca removed the case to the United States District Court for the Western District of Pennsylvania. AstraZeneca later moved for summary judgment, arguing that Baum fell under the outside salesperson and administrative employee exemptions of the PMWA. The District Court concluded that Baum fell under the former exemption and granted AstraZeneca's motion for summary judgment on March 31, 2009. Baum filed this timely appeal.

II.

We exercise "plenary review over the District Court's grant of summary judgment[.]" *Shuman ex*

rel. Shertzer v. Penn Manor Sch. Dist., 422 F.3d 141, 146 (3d Cir.2005) (quoting *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 276 (3d Cir.2001)). A court should grant summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c)(2). In applying that standard, "a court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor." *Shuman*, 422 F.3d at 146 (quoting *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir.1994)). "We may affirm the District Court on any grounds supported by the record." *Nicini v. Morra*, 212 F.3d 798, 805 (3d Cir.2000) (en banc).

III.

Under the PMWA's administrative employee exemption, anyone employed in a "bona fide ... administrative ... capacity" is exempt from the PMWA's overtime protections. 43 Pa. Cons.Stat. § 333.105(a)(5). The exemption applies to employees whose (1) salaried compensation is at least "$250 per week, exclusive of board, lodging or other facilities," 34 Pa.Code § 231.83(5), (2) "primary duty consists of the performance of office or nonmanual work directly related to management policies or general operation of his employer or the customers of the employer," *id.* § 231.83(1), and (3) primary duty "requir[es] the exercise of discretion and independent judgment," *id.* § 231.83(5).[3] "In general, the exercise of discretion

[3] The exemption also applies under other circumstances irrelevant to the instant case.

and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered." 29 C.F.R. § 541.202(a) (explaining "discretion and independent judgment" for the purposes of the Fair Labor Standards Act).[4] Baum's employment at AstraZeneca satisfied these requirements.[5]

The salary requirement of $250 per week was indisputably satisfied. Baum's base salary was $63,000, which amounts to approximately $1,211 per week. The second requirement, performance of nonmanual work directly related to AstraZeneca's general operation, *see* 34 Pa.Code § 231.83(1), was satisfied by Baum's marketing and advertising of AstraZeneca's products, *see* 29 C.F.R. § 541.201(b) ("Work directly related to ... general business operations includes ... work in ... advertising [and] marketing[.]"). *See Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 12 (1st Cir.1997) (applying FLSA administrative employee exemption to insurance marketing representatives); *see also Reich v. Avoca Motel Corp.*, 82 F.3d 238, 240 n. 5 (8th Cir.1996)

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[4] Pennsylvania courts have looked to federal law regarding the Fair Labor Standards Act ("FLSA") for guidance in applying the PMWA. *Commonwealth of Pennsylvania Dept. of Labor and Indus., Bureau of Labor Law Compliance v. Stuber*, 822 A.2d 870, 873 (Pa.Commw.Ct.2003), *aff'd*, 580 Pa. 66, 859 A.2d 1253 (2004) (applying "federal case law" regarding the FLSA to a PMWA claim). According to the Pennsylvania courts, "it is proper to give deference to federal interpretation of a federal statute when the state statute substantially parallels it." *Id.*

[5] We need not reach the issue of whether Baum fell under the outside salesperson exemption of the PMWA, 43 Pa. Cons.Stat. § 333.105(a)(5). We may affirm the District Court on any grounds supported by the record. *Nicini*, 212 F.3d at 805.

(stating that "engaging in 'public relations' work to gain repeat customers" was an administrative task under the FLSA). Baum visited physicians and organized events, such as access meals, prep programs, and peer-to-peer meetings.[6] These activities "disseminat[ed] information to the marketplace [and increased] understanding [of] customers and competitors" and thus were "directly related to [AstraZeneca's general] operations[.]" *John Alden Life Ins. Co.*, 126 F.3d at 12.

The third requirement was also satisfied. Baum's "work requir[ed] the exercise of discretion and independent judgment." 34 Pa.Code § 231.83(5). Baum had significant discretion in how she would approach physicians, whether it be through access meals, peer-to-peer meetings, or other means. In other words, she had to "compar[e] and ... evaluat[e] ... possible courses of conduct, and ... mak[e] a decision after the various possibilities ha[d] been considered." 29 C.F.R. § 541.202(a). According to her resume, Baum "used innovative themes to gain access in offices where the physicians were difficult to see[.]" At her deposition she stated that, depending on the physician, she would change her promotion strategy:

> Q: How would you change your promotion around depending on [the needs of the practice]?
>
> A: If [the physician was not] writing, then we would just ask more questions. Get more data from the doctor. And do what we could to get them to write more. Given the tools we had by

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[6] Our focus on promotion, advertising, and marketing should not be construed to have any bearing on the issue of whether a PSS makes sales for the purposes of the PMWA. That issue is not addressed in this decision.

> the company. I mean, if it meant bringing in a national speaker. I mean, whatever approved resources that I had there approved by the company, that is what I would use.

In addition, Baum spent the majority of her time in the field, unsupervised, calling on physicians. *See* 29 C.F.R. § 541.202(c) (stating that an employee exercises discretion and independent judgment where she "has authority to make an independent choice, free from immediate direction or supervision").[7] Each day, Baum met with other PSSs and they collectively determined which physicians each PSS would visit that day. Baum decided how much time she would spend with a given physician depending on whether the physician was interested in her product. She also decided whether she would use a detail aid in her visit. Every visit was somewhat unique because each physician had different preferences, interests, and availability. After each visit, Baum would make post-call notes to record the details of the conversation. On future visits, she would avoid repeating a message the physician had recently heard. Overall, Baum's day-to-day activities involved making numerous independent judgments on how best to promote AstraZeneca's products.

Moreover, Baum's duties were very similar to the plaintiff's duties in *Smith v. Johnson & Johnson*, 593

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[7] Baum argues that she was subject to extensive oversight by her manager because she had to check her voice mail and e-mail three times a day. Mere oversight by a manager, however, cannot overwhelm the autonomy with which Baum operated on a daily basis while she was out in the field. *See* 29 C.F.R. § 541.202(c) ("[E]mployees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level.").

F.3d 280 (3d Cir.2010), where we held that a pharmaceutical sales representative fell under the administrative employee exemption of the FLSA. *Id.* at 285. In *Smith*, the plaintiff, Patty Lee Smith, was tasked with visiting an average of ten physicians per day to extol the benefits of Johnson & Johnson's pharmaceuticals. *Id.* at 282. Baum had a similar workload. She visited eight or nine physicians per day. Smith, in an effort to cultivate relationships with physicians, would bring food and coffee to physicians' offices. *Id.* Baum similarly organized access meals. On physician visits, Smith "worked off of a prepared 'message'" provided by her employer, *id.*, just like Baum. Numerous other similarities exist. For example, both individuals could use only certain approved visual aids in their presentations to physicians, id., both were trained on how to conduct a physician visit by their employer, *id.*, and both prepared post-call notes after physician visits, *id.* at 283. Thus, our conclusion that Baum exercised discretion and independent judgment in her day-to-day activities is further supported by the numerous similarities between Baum and Smith's roles. *See id.* at 282-83.

IV.

To summarize, Baum's salary of $1,211 per week exceeded the minimum salary requirement of $250 per week. Her promotional activities directly related to the general operation of AstraZeneca because she was involved in advertising and marketing AstraZeneca's products. Baum's day-to-day interactions with physicians required her to exercise a significant amount of discretion and independent judgment. Baum chose how she would promote AstraZeneca products to each physician in her territory. Her

approach would change depending on the physician she was visiting. Based on these determinations, we conclude that Baum satisfied all the requirements of the PMWA's administrative employee exemption, and she cannot avail herself of the PMWA's overtime protections. Thus, we will affirm the District Court's judgment.

APPENDIX C

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-2150

KRISTEN BAUM, on behalf of herself and all others similarly situated,

Appellant

v.

ASTRAZENECA LP (also known as AstraZeneca Pharmaceuticals, LP or Astra-Zeneca, Inc.)

On Appeal from the United States District Court
for the Western District of Pennsylvania
District Court No. 3-07-cv-00090
District Judge: The Honorable Kim R. Gibson

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
January 14, 2010

Before: SCIRICA, *Chief Judge*, BARRY, and SMITH, *Circuit Judges*

(Filed: March 24, 2010)

OPINION

SMITH, *Circuit Judge*.

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Facts

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[1] We have jurisdiction under 28 U.S.C. § 1291. The District Court exercised jurisdiction under 28 U.S.C. § 1332.

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II.

We exercise "plenary review over the District Court's grant of summary judgment[.]" *Shuman ex*

rel. Shertzer v. Penn Manor Sch. Dist., 422 F.3d 141, 146 (3d Cir. 2005) (quoting *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 276 (3d Cir. 2001)). A court should grant summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). In applying that standard, "a court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor." *Shuman*, 422 F.3d at 146 (quoting *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir. 1994)). "We may affirm the District Court on any grounds supported by the record." *Nicini v. Morra*, 212 F.3d 798, 805 (3d Cir. 2000) (en banc).

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Under the PMWA's administrative employee exemption, anyone employed in a "bona fide . . . administrative . . . capacity" is exempt from the PMWA's overtime protections. 43 Pa. Cons. Stat. § 333.105(a)(5). The exemption applies to employees whose (1) salaried compensation is at least "$250 per week, exclusive of board, lodging or other facilities," 34 Pa. Code § 231.83(5), (2) "primary duty consists of the performance of office or nonmanual work directly related to management policies or general operation of his employer or the customers of the employer," *id.* § 231.83(1), and (3) primary duty "requir[es] the exercise of discretion and independent judgment," *id.* § 231.83(5).[3] "In general, the exercise of discretion and independent judgment involves the comparison

[3] The exemption also applies under other circumstances irrelevant to the instant case.

and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered." 29 C.F.R. § 541.202(a) (explaining "discretion and independent judgment" for the purposes of the Fair Labor Standards Act).[4] Baum's employment at AstraZeneca satisfied these requirements.[5]

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gain repeat customers" was an administrative task under the FLSA). Baum visited physicians and organized events, such as access meals, prep programs, and peer-to-peer meetings.[6] These activities "disseminat[ed] information to the marketplace [and increased] understanding [of] customers and competitors" and thus were "directly related to [AstraZeneca's general] operations[.]" *John Alden Life Ins. Co.*, 126 F.3d at 12.

The third requirement was also satisfied. Baum's "work requir[ed] the exercise of discretion and independent judgment." 34 Pa. Code § 231.83(5). Baum had significant discretion in how she would approach physicians, whether it be through access meals, peer-to-peer meetings, or other means. In other words, she had to "compar[e] and . . . evaluat[e] . . . possible courses of conduct, and . . . mak[e] a decision after the various possibilities ha[d] been considered." 29 C.F.R. § 541.202(a). According to her resume, Baum "used innovative themes to gain access in offices where the physicians were difficult to see[.]" At her deposition she stated that, depending on the physician, she would change her promotion strategy:

> Q: How would you change your promotion around depending on [the needs of the practice]?
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> A: If [the physician was not] writing, then we would just ask more questions. Get more data from the doctor. And do what we could to get them to write more. Given the tools we had by the company. I mean, if it meant bringing in a

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[6] Our focus on promotion, advertising, and marketing should not be construed to have any bearing on the issue of whether a PSS makes sales for the purposes of the PMWA. That issue is not addressed in this decision.

> national speaker. I mean, whatever approved resources that I had there approved by the company, that is what I would use.

In addition, Baum spent the majority of her time in the field, unsupervised, calling on physicians. *See* 29 C.F.R. § 541.202(c) (stating that an employee exercises discretion and independent judgment where she "has authority to make an independent choice, free from immediate direction or supervision").[7] Each day, Baum met with other PSSs and they collectively determined which physicians each PSS would visit that day. Baum decided how much time she would spend with a given physician depending on whether the physician was interested in her product. She also decided whether she would use a detail aid in her visit. Every visit was somewhat unique because each physician had different preferences, interests, and availability. After each visit, Baum would make post-call notes to record the details of the conversation. On future visits, she would avoid repeating a message the physician had recently heard. Overall, Baum's day-to-day activities involved making numerous independent judgments on how best to promote AstraZeneca's products.

Moreover, Baum's duties were very similar to the plaintiff's duties in *Smith v. Johnson & Johnson*, 593 F.3d 280 (3d Cir. 2010), where we held that a phar-

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[7] Baum argues that she was subject to extensive oversight by her manager because she had to check her voice mail and e-mail three times a day. Mere oversight by a manager, however, cannot overwhelm the autonomy with which Baum operated on a daily basis while she was out in the field. *See* 29 C.F.R. § 541.202(c) ("[E]mployees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level.").

maceutical sales representative fell under the administrative employee exemption of the FLSA. *Id.* at 285. In *Smith*, the plaintiff, Patty Lee Smith, was tasked with visiting an average of ten physicians per day to extol the benefits of Johnson & Johnson's pharmaceuticals. *Id.* at 282. Baum had a similar workload. She visited eight or nine physicians per day. Smith, in an effort to cultivate relationships with physicians, would bring food and coffee to physicians' offices. *Id.* Baum similarly organized access meals. On physician visits, Smith "worked off of a prepared 'message'" provided by her employer, *id.*, just like Baum. Numerous other similarities exist. For example, both individuals could use only certain approved visual aids in their presentations to physicians, *id.*, both were trained on how to conduct a physician visit by their employer, *id.*, and both prepared post-call notes after physician visits, *id.* at 283. Thus, our conclusion that Baum exercised discretion and independent judgment in her day-to-day activities is further supported by the numerous similarities between Baum and Smith's roles. *See id.* at 282-83.

IV.

To summarize, Baum's salary of $1,211 per week exceeded the minimum salary requirement of $250 per week. Her promotional activities directly related to the general operation of AstraZeneca because she was involved in advertising and marketing AstraZeneca's products. Baum's day-to-day interactions with physicians required her to exercise a significant amount of discretion and independent judgment. Baum chose how she would promote AstraZeneca products to each physician in her territory. Her approach would change depending on the physician she was visiting. Based on these determinations, we

conclude that Baum satisfied all the requirements of the PMWA's administrative employee exemption, and she cannot avail herself of the PMWA's overtime protections. Thus, we will affirm the District Court's judgment.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

KRISTEN BAUM, on behalf of herself and all others similarly situated,

CIVIL ACTION NO. 3:2007-cv-90

Plaintiff,

v.

JUDGE KIM R. GIBSON

ASTRAZENECA LP

Defendants.

MEMORANDUM OPINION and ORDER

Plaintiff Kristin Baum seeks damages from Defendant AstraZeneca LP for alleged violations of Pennsylvania law that requires overtime pay for non-exempt employees. Ms. Baum, a pharmaceutical sales representative, argues that AstraZeneca improperly treated her position as exempt from Pennsylvania's wage and hour laws. AstraZeneca disagrees, arguing that the job tasks performed by Ms. Baum fall within the statutory exemption for outside sales work. In addition to seeking resolution of her own claim, Ms. Baum also seeks to act as representative for a class of individuals whom she alleges are similarly situated.

This matter comes before the Court on Defendant AstraZeneca LP's "Motion for Summary Judgment Seeking Dismissal With Prejudice of Plaintiff Baum's Claims" (Doc. No. 52). AstraZeneca asserts three grounds for why it should be granted summary

judgment: first, that Ms. Baum is exempt from the overtime pay regulations under the outside salesperson exemption; second, in the alternative, that Ms. Baum is exempt from the overtime pay regulations under the administrative exemption; and third, also alternatively, that Ms. Baum's claims are preempted by federal law. Ms. Baum disputes each of these grounds, arguing that AstraZeneca's Motion must be denied because she did not sell anything for AstraZeneca, her duties do not qualify her for the administrative exemption, and that preemption is not appropriate. Ms. Baum asserts that since she should not have been classified as exempt, and because she frequently worked more than 40 hours per week, she is entitled to appropriate back-pay damages.

For the reasons set forth below, Defendant's Motion for Summary Judgment is granted, and the remaining pending motions in this matter (Doc. Nos. 19, 49, and 69) are accordingly denied as moot.

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND[1]

On March 27, 2007, Plaintiff Baum filed a lawsuit in the Court of Common Pleas of Westmoreland County, Pennsylvania. On April 20, 2009, AstraZeneca removed the action to this Court. The Court has jurisdiction over the claims in this matter pursuant to 28 U.S.C. §§ 1332, 1441, and 1446. Venue is

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[1] The facts are taken from the documentary evidence and memoranda submitted to the Court, and are considered in the light most favorable to Ms. Baum, the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Any proposed facts not contained within this recitation of facts were found by the Court to be immaterial or disputed.

proper in this Court pursuant to 28 U.S.C. § 1391(a)(2). While both parties have filed numerous other pretrial motions, the Court now considers AstraZeneca's Motion for Summary Judgment.

AstraZeneca researches, develops, manufactures, and sells pharmaceuticals. Doc. Nos. 53 and 63, ¶ 1. AstraZeneca employs numerous individuals carrying the title "Pharmaceutical Sales Specialist" (hereinafter "PSS"). *Id.* ¶ 2. AstraZeneca hired Ms. Baum on April 13, 1998. *Id.* ¶ 3. Ms. Baum worked in various non-sales positions during her first four years with AstraZeneca. *Id.* ¶ 4. Having initially pursued the PSS position because she "always wanted to be in sales," Ms. Baum worked as a PSS from May 1, 2003 to November 1, 2006. *Id.* ¶ 5. She worked first on AstraZeneca's respiratory team and later on the cardiovascular team. *Id.* ¶ 7. Working with a small team of other PSS's, Ms. Baum was responsible for numerous AstraZeneca pharmaceuticals. *Id.* ¶¶ 8-9.

AstraZeneca provided Ms. Baum with training on its products and selling philosophy, known as "Interactive Strategic Selling" ("ISS"). *Id.* ¶¶ 10-11. Ms. Baum generally followed the ISS model in interacting with physicians. *Id.* ¶ 12. As part of Ms. Baum's initial training, she engaged in role-playing to simulate future interactions with physicians; furthermore, she initially received field training by accompanying more experienced PSS's. *Id.* ¶¶ 13-14. Ms. Baum also received ongoing computer-based product training. *Id.* ¶ 15.

Because her job required fluency in the sophisticated vocabulary and processes of pharmaceuticals and drug delivery, including an understanding of medical terms, disease states and drug pathways, Ms. Baum enrolled in outside classes to obtain

additional relevant knowledge. *Id.* ¶¶ 16-17. She exerted substantial efforts to learn about pharmaceuticals, because she "need[ed] to know [her] products inside and out." *Id.* ¶ 17. Ms. Baum once gave a training presentation at an AstraZeneca district meeting about a clinical study involving Crestor. *Id.* ¶ 18.

Ms. Baum's purpose in her job as a PSS was to increase AstraZeneca's market share "through personal selling" to physicians. *Id.* ¶ 19. In 2006, during a time period in which Ms. Baum worked as a PSS, one computational measure for AstraZeneca's market share for Crestor increased by three percent. *Id.* ¶ 20. Ms. Baum spent the "vast majority" of each work day in the field, making calls upon physicians. *Id.* ¶ 21. Ms. Baum and AstraZeneca referred to physicians as "customers." *Id.* ¶ 23.

Ms. Baum used her skills and abilities in creative manners to gain access to busy physicians and build relationships with them. *Id.* ¶¶ 24-25. She frequently scheduled sponsored meals, termed "access meals", which were used to build relationships with physicians and promote AstraZeneca's products. *Id.* ¶¶ 24-28. Both access meals and typical in-office sales calls varied in length, depending upon the circumstances. *Id.* ¶¶ 29-30. Generally, Ms. Baum's in-office sales calls were quite short. *Id.* ¶ 30. She testified that she had "good access" to doctors. *Id.* ¶ 31.

Ms. Baum utilized AstraZeneca's ISS selling model with audience physicians, and adjusted her technique depending on the particular physician. *Id.* ¶ 32. Portions of Ms. Baum's pitches were based upon scripts provided by AstraZeneca, and certain physician questions passed through her to be answered by

AstraZeneca's central office. *Id.* ¶¶ 32-36. Ms. Baum conducted various methods of self-critique in order to improve her efforts. *Id.* She also used a variety of personal relations tactics, including providing food, coupons and samples. *Id.* Ms. Baum's ultimate purpose in visiting the physician was to convey the strengths of AstraZeneca's products and persuade physicians to write prescriptions for AstraZeneca products. *Id.* ¶¶ 36-37. As part of this central purpose, she typically concluded her meetings with physicians by directly asking them for commitments to write prescriptions for AstraZeneca products in appropriate circumstances. *Id.* ¶¶ 38-39.

Ms. Baum utilized various AstraZeneca-approved sales aids while calling upon physicians, including core visual aids, clinical studies, and package inserts. *Id.* ¶ 41. She exercised discretion in selecting which portions of the approved AstraZeneca materials were appropriate to discuss with the doctor. *Id.* ¶ 42.

As an additional part of her promotional efforts, Ms. Baum organized and attended programs featuring knowledgeable speakers who were appealing to physicians. *Id.* ¶¶ 43-44.

Ms. Baum worked in the field alone most of her time; she was expected to work during all regular work hours, and was required to notify the manager upon any need for leave. *Id.* ¶ 45. AstraZeneca required that she maintain a strict regimen in relation to notekeeping, and checking voice messages and emails. *Id.* Furthermore, AstraZeneca's district sales manager tracked Ms. Baum's daily activities; the manager also accompanied her on calls approximately once every one to two months. *Id.* ¶¶ 45-46. Following such accompanied visits, Ms. Baum's manager reviewed her performance, assessing her

selling abilities under the ISS model. *Id.* ¶¶ 47-48. Such performance reviews were considered in promotion decisions, and a portion of Baum's compensation was tied to various AstraZeneca sales targets and market share computations. *Id.* ¶¶ 49-50.

Ms. Baum herself considered her PSS job as a sales job. *Id.* ¶ 51. She described her job strategy as focused upon "clinical selling that show the advantage of our products to the competitors...." *Id.* ¶ 52.

Ms. Baum spent ninety percent of each work day making calls in the field. *Id.* ¶ 56. A typical day included ten to twelve hours in the field, with one hour of "computer time" at home. *Id.* Her expense reports included access meals and programs planned and conducted by her. *Id.* ¶ 57. Her resume describes one of her job duties as follows: "Analyze reports from headquarters on all products and communicate with the team so the territory is able to grow market share or change current strategies." *Id.* ¶ 58.

Ms. Baum earned an annual salary of $63,000 per year. *Id.* ¶ 59. She characterized her primary duty as a PSS as promoting AstraZeneca products. *Id.* ¶ 60. She utilized various methods of promotion during her visits to physicians, including explaining company-provided data and providing coupons and samples. *Id.* ¶¶ 61-64.

Defendant argues that Ms. Baum exercised substantial judgment and discretion while discussing pharmaceutical products with physicians; Plaintiff argues that "Baum gave the same canned speech to each physician." *Id.* ¶ 65. AstraZeneca's ISS model called for a "dialogue, not only a presentation." *Id.* ¶ 66. Ms. Baum analyzed territory and market trends, using both company-provided data, and information

culled from her own interactions with physicians. *Id.* ¶¶ 68-69.

II. STANDARD OF REVIEW

A court should grant summary judgment where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Troy Chem. Corp. v. Teamsters Union Local No. 408*, 37 F.3d 123, 125-26 (3d Cir.1994). In deciding a summary judgment motion, a court must "view the evidence ... through the prism of the substantive evidentiary burden" to determine "whether a jury could reasonably find either that the plaintiff proved his case by the quality and quantity of the evidence required by the governing law or that he did not." *Anderson v. Consol. Rail Corp.*, 297 F.3d 242, 247 (3d Cir.2002) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). A court considers only admissible evidence and admissions. *See* Fed.R.Civ.P. 56(e)1 and 36.

Essentially, summary judgment is appropriate only where a trial is not needed to resolve any genuine disputes of material facts. 10A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2728 (1998). An issue of material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."

Id. at 248, 106 S.Ct. at 2510, 91 L.Ed.2d at 211 (1986). The Supreme Court further explained: "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986)(internal citation omitted). Even where a moving party seems to have discharged its burden, a court retains discretion to deny a motion for summary judgment. 10A FPP § 2728.

III. PENNSYLVANIA WAGE LAWS AND RELATION TO FLSA

This action was brought pursuant to the Pennsylvania Minimum Wage Act ("PMWA"), 43 Pa. Cons.Stat. §§333.104. In many respects, the PMWA mirrors the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (FLSA). *See Commonwealth of Penn., Dept. of Labor v. Stuber*, 822 A.2d 870, 873 (Pa.Commonw.Ct.2003). Furthermore, Pennsylvania courts have indicated that it may be proper to interpret the PMWA in light of federal interpretation of the FLSA, given the substantial similarity. *See, e.g., Commonwealth v. Penn. Labor Relations Bd.*, 107 Pa.Cmwlth. 132, 527 A.2d 1097 (1987).

Congress enacted the FLSA in 1938 to protect certain covered workers from "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." *See* 29 U.S.C. § 202(a); *see also Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739, 101 S.Ct. 1437, 1444, 67 L.Ed.2d 641 (1981) ("[T]he FLSA was designed to give specific minimum protections to individual workers and to ensure that each employee covered by the Act would

receive " '[a] fair day's pay for a fair day's work' " and would be protected from "the evil of 'overwork' as well as 'underpay.'") (quoting *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578, 62 S.Ct. 1216, 1220, 86 L.Ed. 1682 (1942)) (emphasis in original). As evident from exemptions drafted into the FLSA over the years, Congress does not intend to protect all workers in an equal fashion. *See Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706, 65 S.Ct. 895, 902, 89 L.Ed. 1296 (1945) ("The legislative history of the Fair Labor Standards Act shows an intent on the part of Congress to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce."); *see also Biggs v. Wilson*, 828 F.Supp. 774, 777 (E.D.Cal.1991) ("The FLSA was intended to protect the worker whom Congress regarded as having unequal bargaining power.")

Both the FLSA and the Pennsylvania Act establish requirements that workers must be paid overtime wages for hours worked in excess of forty per week. 43 P.S. § 333.104(c); 29 U.S.C. § 207(a)(1). Additionally, both bodies of law contain extremely similar outside sales and administrative exemptions, which will be discussed *infra*. In 2004, the Department of Labor explained that such exemptions were premised on the idea that such workers typically earned high salaries and other compensation, and the type of work performed was difficult to standardize to a set time frame, or spread to other workers.[2]

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[2] Dep't. of Labor, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 69 Fed. Reg. 22122, 22123-24 (Apr. 23, 2004)

Because the FLSA is a remedial act, its exemptions are typically narrowly construed. *See Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S.Ct. 453, 456, 4 L.Ed.2d 393 (1960) ("We have held that these exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit."). Furthermore, the employer bears the burden of proving that its employees fit within an exemption. *Friedrich v. U.S. Computer Servs.*, 974 F.2d 409, 412 (3d Cir.1992) ("It is the employer's burden to affirmatively prove that its employees come within the scope of the overtime exemption, and any exemption from the Act must be proven plainly and unmistakably.") (citing *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 900 (3d Cir.1991)).

A. Outside Sales Exemption

Under both the FLSA[3] and the PMWA, "outside salesmen"[4] are exempt from overtime provisions. 43 Pa. Cons. Stat. § 333.105(a)(5) provides:

> (5) In a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools) or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the secretary, except that an employee of a retail or

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[3] 29 U.S.C. § 213(a)(1), as defined in 29 C.F.R. § 541.500, *et seq*.

[4] In light of the dated language used in the Pennsylvania statute and regulation, the Court in its discussion elects to use the more modern term "salesperson" in place of "salesman."

> service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his or her workweek which he or she devotes to activities not directly or closely related to the performance of executive administrative activities, if less than forty percent of his or her hours worked in the workweek are devoted to such activities);

Pursuant to the grant of authority of 43 Pa. Cons.Stat. § 333.105(a)(5), the term "outside salesman" is defined in Pennsylvania's code of regulations:

> Outside salesman means an employee who is employed for the purpose of and who is customarily and regularly engaged more than 80% of work time away from the employer's place or places of business in the following manner:
>
> (1) Making sales, including any sale, exchange, contract to sell, consignment for sale, or other disposition or selling, and delivering articles or goods.
>
> (2) Obtaining orders or contracts for the use of facilities for which a consideration will be paid by the client or customer. In addition, the employee may not spend more than 20% of the hours worked in any week in work of a nature not directly related to and in conjunction with the making of sales; provided however, that work performed incidental and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be not regarded as nonexempt work.

34 Pa.Code § 231.85.

B. Administrative Exemption

Both Pennsylvania law and the FLSA[5] exempt employees employed in certain administrative capacities. Under Pennsylvania law, an exempt employee is one who meets the following criteria: (1) is "compensated on a salary or fee basis at a rate of not less than $250 per week"; (2) has a "primary duty", meaning in part that at least 80% of time is spent in such work, that "consists of the performance of office or nonmanual work directly related to management policies or general operation of his employer or the customers of the employer" (3) has a primary duty that "includes work requiring the exercise of discretion and independent judgment." *See* 34 Pa.Code § 231.83.

IV. DISCUSSION

A. Ms. Baum was Properly Classified as an Exempt Outside Salesperson

The first issue before the Court is whether Ms. Baum was properly classified as an exempt outside sales-person. Ms. Baum emphasizes that given the Court's duty to construe the exemption narrowly, she does not fit clearly and unmistakably within the exemption's terms. However, upon a straightforward construction of the statute and the subsequent assessment of the undisputed facts, the Court finds that AstraZeneca meets its burden in showing that Ms. Baum falls within the exemption. Importantly, classifying Ms. Baum as exempt comports with the function, purpose and spirit of Pennsylvania's wage and labor laws.

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[5] 29 U.S.C. § 213(a)(1).

From the plain language of the Pennsylvania definition of outside salesperson, three simple requirements emerge that are relevant to the matter at hand: 1) that the employee is employed for the purpose of "[m]aking sales" or "obtaining orders"; and 2) that the employee is "customarily and regularly engaged more than 80% of work time away from employer's place or places of business" in making sales; and 3) that the employee not spend more than "20% of the hours worked in any week in work of a nature not directly related to and in conjunction with the making of sales." *Id.* Of particular note is the language that follows "making sales": "including any sale, exchange, contract to sell, consignment for sale, or other disposition or selling, and delivering articles or goods." 34 Pa.Code § 231.85. The language of the Pennsylvania regulation is substantially similar to the federal regulations defining "sales" and "obtaining orders." 29 C.F.R. § 541.501(b)-(c).

In construing such statutory and regulatory language, the Court first considers the plain meaning of the language to the extent possible. *Caminetti v. U.S.*, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain ... the sole function of the courts is to enforce it according to its terms."). This Court remains cognizant of its responsibility to employ common sense in interpreting statutory language, meaning that refusing to appreciate the social goals of the legislation, or the problem the statute was intended to address, would inappropriately ignore and defeat the spirit of these laws. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 586, 103 S.Ct. 2017, 2025, 76 L. Ed. 2d 157

(1983) (discussing the importance, in certain situations, of considering the purpose of the statute).

1. Ms. Baum Actually Made Sales or Obtained Orders, and was Employed for the Purpose of Making Sales and Obtaining Orders

From the Court's perspective, while the parties draw differing legal conclusions, they do not appear to dispute the bare facts of Ms. Baum's actual working responsibilities and activities.[6] These undisputed facts[7] portray an employee who, while trained by corporate managers and provided with corporate materials, nonetheless exhibited substantial independence and creativity in conducting her daily pursuits.

Ms. Baum's filings essentially argue that she was employed merely to feed, entertain and inform physicians, and therefore was not employed for the purpose of making sales or obtaining orders. She argues that her job was in the nature of non-exempt promotional work only. In response, AstraZeneca characterizes Ms. Baum's contentions as counter-intuitive, arguing that all PSS's, including Ms. Baum, were obviously employed for the purpose of making sales.

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[6] Rather than presenting details or facts that depict her work responsibilities, Ms. Baum instead primarily utilized her Counter Statement of Facts to cloak legal arguments regarding the proper definition of "sales" in the guise of factual characterizations.

[7] Of course, at the summary judgment stage, much of the Court's fact-finding re-sponsibilities are drastically limited; however, even such limited fact-finding responsibilities are essentially unnecessary due to the parties' admissions; therefore, this Court will dive directly into the word battle, as framed and laid out by Ms. Baum.

a. Appropriate Definition of Sales as Understood within the Singular Pharmaceutical Industry

Prior to a determination of whether Ms. Baum was employed for the purpose of making sales, the Court first finds it necessary to consider the term "sale" and determine whether Ms. Baum made sales.[8]

First, this Court believes that the term "sale" can only be defined and considered in a manner that remains cognizant of practices within a particular industry. *See In re Novartis Wage and Hour Lit.*, 593 F.Supp.2d 637, 649, 653 (S.D.N.Y.2009) (explaining that courts have properly "taken into account the characteristics of the industry in question when determining the applicability of the outside sales exemption" and "recognizing the realities of the pharmaceutical industry is not incompatible with engaging in a narrow reading"). Such an effort is not back-fitting a statutory regime to an industry, but rather employing common sense in applying broad statutory language to a specific case and controversy.

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[8] Plaintiff urges upon the Court certain definitions of the term "sale" that have been put forth in explanations and statements by the federal Department of Labor; in particular, the Department of Labor has presented certain examples in an attempt to assist distinguishing exempt sales work from non-exempt promotional work. As mentioned, because the Pennsylvania Act is modeled upon the FLSA, such material may be treated by Pennsylvania Courts as significant and persuasive. However, because this Court is not interpreting or construing the FLSA, there is no need to depend fully upon the Department of Labor's statements, especially given the Court's perspective that such statements, while intended to properly describe the statute, and clarify boundary lines for purposes of providing notice, markedly fail to accomplish such goals, as illustrated by this litigation.

The precise contours of a "sale" naturally differ across industries, markets, and even cultures. Therefore, the Court begins its construction of the Pennsylvania statute and regulation, and the term "sale", with a necessary prefatory discussion of the pharmaceutical industry.

Obviously, the pharmaceutical industry is heavily regulated.[9] Of primary importance within this regulatory system is the Food and Drug Administration, which classifies all pharmaceuticals. *See* O'Reilly, *Food and Drug Administration* §§ 18:9 to 18:16 (3d ed. 2008). Pursuant to this regime, patients are not allowed to purchase certain pharmaceuticals directly from pharmaceutical companies. Instead, the patient obtains a prescription for a particular pharmaceutical from her physician, and ultimately purchases the pharmaceutical from a pharmacist.

Under such a framework, the question naturally arises as to when or how a sale occurs. Does a sale occur only when the patient actually obtains the drug from the pharmacist? Or does a sale occur when a physician resolves in his mind to prescribe a certain pharmaceutical to future patients with a certain set of symptoms? What if the doctor never treats a patient fitting this criteria? What if the patient never actually fulfills the prescription?

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[9] The basics of this country's system of pharmaceutical regulation, at least in terms of its impact upon access to prescription drugs, are fairly well-understood by all in our society, given the need for nearly all of us to navigate this system on a regular basis; therefore, much of the discussion about such basics will proceed without distracting and ultimately unnecessary citations. Where the Court believes that a particular issue may not be obvious, a citation to a potentially helpful source will be included.

Leaving aside such questions for the moment, the Court first considers the issue of sales from the perspective of a pharmaceutical company. In the above simplified framework, a company seeking to increase sales may exert pressure upon essentially two levers: the actual patient, and the prescribing physician. In what is a relatively recent development, some pharmaceutical companies run mass-market advertisements directed at consumers.[10] The purpose of such advertisements is simple: to impress upon consumers that a particular pharmaceutical may be appropriate for their use, thus encouraging them to query their personal physicians about prescribing that pharmaceutical. Second, and more traditionally, a pharmaceutical company advertises directly to the gatekeeper physician; by impressing upon that physician the positive attributes of the pharmaceutical, the company may reasonably expect an increase in eventual pharmaceutical sales.

For decades, the pharmaceutical industry has invested substantial amounts of money in its sales forces, consisting of well-paid individuals who visit physicians and personally advocate the virtues and values of certain pharmaceuticals; such efforts have been viewed as effective.[11] The motivation for organizing the sales forces in this way followed from not only the delivery mechanism inherent in pharmaceutical sales, but also the culture and ethics of the health services industry. Consequently, the Court

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[10] *See* Wilkes, Bell and Kravitz, *Direct-to-Consumer Prescription Drug Advertising:Trends, Impacts, and Implications*, 19 Health Affairs 2, 110-128 (2000).

[11] *See generally IMS Health, Inc. v. Ayotte*, 550 F.3d 42,56 (1 st Cir. 2008) (discussing the evident efficacy of"detailers" or phannaceutical sales representatives).

believes that a rudimentary examination of this culture, including two broad conceptual categories described by legal scholars within the field, is necessary prior to probing the more fundamental question of sales within the industry.

First, as is perhaps obvious to all, pharmaceutical sales, and indeed all medical services, simply do not function as a typical market. Aspects of this market failure are inevitable given the nature of the industry; however, part of the market failure may also be traced to the professional culture of physicians. Numerous theorists believe that physicians operate under what is aptly described as the professional paradigm.[12] Under this professional paradigm, regulation and professional ethics act as a substitute or replacement for a typical free market.[13] The professional model dictates that physicians should operate as substitute decision makers, rather than sources of advice and information.[14] Additionally, such decisions were made solely upon the basis of the inerrant and unbiased revelations of science.[15] Upon

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[12] *See, e.g.*, Clark C. Havighurst, *The Professional Paradigm of Medical Care: Obstacle to Decentralization*, 30 Jurimetrics J. 415, 419-21 (1990).

[13] *See* James F. Blumstein, *Health Care Law and Policy: Whence and Whither*, 14 Health-Matrix: Journal of Law Medicine 35, 38 (2004)("The professional model takes as its premise that, empirically, the economic marketplace does not and cannot function properly in the healthcare field, and, normatively, that it should not so function.").

[14] *Id.*

[15] *See, e.g.*, James F. Blumstein, *Health Care Reform and Competing Visions of Medical Care: Antitrust and State Provider Cooperation Legislation*, 79 Cornell L. Rev. 1459, 1466 (1994).

this justification of possessing knowledge inaccessible to lay-people, doctors control nearly all relevant decision making in terms of access to medical services.[16]

This role of doctors as substitute decision-makers emerged concomitant to the belief that patients themselves are incapable of understanding sufficient information to make intelligent medical decisions.[17]

In other words, the information asymmetry between physician and patient is simply a bridge too far: because only physicians have the extensive required scientific knowledge and training to make informed health care choices, they alone must make medical decisions, as patients simply could not possibly make wise decisions for themselves. This pure professional paradigm empowers physicians and subordinates individual consumer preference and choice.

Another model for describing health services delivery is the market or economic paradigm. In recent years, in medical practice, this market paradigm has made some inroads against the pure professional paradigm, in part in response to extreme cost escalation, developments in antitrust law, and mounting empirical evidence that economic incentives materially affect the putatively neutral decisions of professional physician.[18] This movement, while generally

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[16] *Id.* at 38-39.

[17] *Id.* ("[P]atients are not well informed about the technically complex dimensions of medical care and are not really capable of becoming adequately informed so as to exercise control as they would in a typical market-based context.).

[18] *See generally* Rand E. Rosenblatt, *The Four Ages of Health Law*, 14 Health Matrix: Journal of Law-Medicine 155 (2004)

calling for the introduction of economic decisions and cost-benefit analyses,[19] also pushes back on the profession model by arguing that patients themselves can and should ultimately control the decision-making process with respect to their medical treatment.[20] Thus, the market paradigm suggests that physicians, rather than being substitute decision-makers, should instead inform and educate patients. Under this model, physician and customer work together in shared decision-making about treatment plans.[21] A court's understanding of or disposition toward the assumptions and philosophies behind these frameworks is significant.[22]

This simplified discussion of these broad descriptive theories underlying health services, and the awareness of the likely influence of these descriptive norms upon pharmaceutical sales, assists the Court in answering its previously formulated question as to

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(describing the nature and influence of various philosophical models, including the professional and market paradigms, that shape health care law and delivery).

[19] *See* James F. Blumstein, *Medicine Isn't an Economics-Free Zone*, Wall 81. J., June 22, 2001, at A14.

[20] James. F. Blumstein, *Health Care Reform and Competing Visions of Medical Care: Antitrust and State Provider Cooperation Legislation*, 79 Cornell L. Rev. 1459, 1475 (explaining that "as the degree of disclosure expands, patient autonomy and empowerment increase.")

[21] *Id.* at n. 68.

[22] *Compare Pegrom* v. *Herdrich*, 154 F.3d 362, 374-80 (7th Cir. 1998) (warning of the dangers and problems associated with allowing economic factors to influence medical decision-making), with *Pegrom* v. *Herdrich*, 530 U.S. 211,236-37, 120 S. Ct. 2143, 2158,147 L. Ed. 2d 164 (2000) (reversing the Seventh Circuit decision while acknowledging the significance of market-oriented health care reforms).

when a "sale" occurs in the pharmaceutical industry. Significantly, the Court believes that the professional paradigm still accurately describes much of the actual practices of the health services industry.

Therefore, for reasons both cultural and regulatory, a pharmaceutical salesperson simply cannot go door-to-door through neighborhoods carrying a briefcase full of Levitra. Instead, the pharmaceutical salesperson must approach the person with the decision-making power: under the professional paradigm, that person is always the physician.

Even under the more modern, market-oriented paradigm, the physician still wields substantial control and influence over the patient's choice. In most instances, the physician likely remains a substitute decision-maker; in other instances, at the very least, the physician retains influence and partial control as a necessary limb in a shared decision-making process.

The Court now returns to the definition of "sale", and the somewhat related question of when a sale actually occurs. Obviously, a pharmaceutical sale is not exactly final until the patient herself completes a transaction by taking the physician permission slip (prescription) to a pharmacist for completion of the sale.[23] However, the statutory language does not require a final sale, complete and consummated.

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[23] And frankly, this whole story could become even more contrived if the Court chose to dive into the bizarre world of medical insurance and third-party payment; perhaps the attorneys in this matter missed some fascinatingly obtuse arguments as to whether a consumer is even a consumer a third-party payeris ultimately the responsible fiscal engine behind the sales transaction.

Thus, pursuant to the above industry specifics, the Court believes that a "sale" may be defined as substantially occurring at the moment a physician commits to prescribing a particular pharmaceutical when treating a particular patient. In *Clements* v. *Serco,* in considering this question under the FLSA, the Tenth Circuit explained: "the touchstone for making a sale, under the Federal Regulations, is obtaining a commitment." 530 F.3d 1224, 1227 (10th Cir. 2008). Importantly, the facts of the case *sub judice* illustrate that the PSS's were trained and employed for the purpose of obtaining a commitment, which is the "touchstone" for making a sale.[24]

The Court concludes that in the pharmaceutical industry, the strongest evidence for sales activity and being employed for the purpose of making sales, is that the employee obtains commitments from physicians. Ms. Baum did precisely that: after carefully preparation and planning, she skillfully asked physicians for commitments to prescribe AstraZeneca products in appropriate situations. The capacity of a salesperson to obtain such commitments, in any field, is rare, and consequently well-compensated by private industry; the effort and charisma required to successfully close, as will be discussed *infra*, is a hallmark of professional sales activity.

Consequently, the Court holds that in the pharmaceutical context, given the realities of the professional paradigm, a sale occurs when a physician commits to prescribe a certain product in a certain

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[24] In this matter, the Court does not extensively analyze the numerous relevant federal administrative regulations and related statements; nonetheless, such regulations and commentary have been considered by the Court.

situation. Therefore, the Court believes that a pharmaceutical sales representative, upon obtaining a commitment from a physician, has "in some sense" made a sale. *See* Dep't of Labor, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule, Fed. Reg. 22122, 22162-63 (Apr. 23, 2004). Relatedly, where a pharmaceutical sales representative seeks to obtain a physician's professional commitment to prescribe certain pharmaceuticals, that representative was engaged in making sales. Importantly, Ms. Baum was not visiting the physician only to provide some education or background to pave the way, or prepare the physician for another appointment with a primary salesperson.

This Court believes that other courts, and perhaps regulatory agencies, underestimate the significance of this oral commitment from physicians.[25] In part, this error emerges from a misunderstanding of the ways in which human beings are socially and informally motivated. Sometimes lawyers and judges forget that a person's word means something; remarkably, many people do not actually need a 400-page contract to bind themselves to their word. Yale's Yochai Benklar, a thinker with incisive prescience, explains that non-market intrinsic factors can serve as a more powerful motivating force than typical extrinsic economic incentives;[26] applying such a theory to this situation, it is possible to imagine one business that thrives over time, enjoying ongoing,

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[25] As shown by the typical budgets allotted for pharmaceutical representative programs, pharmaceutical companies have not made the same mistake.

[26] *See* Yochai Benkler, *The Wealth of Networks* 92-99 (2006).

non-contractual relationships with its clientele, while a nearly identical business falters, its obsession with formalized contracts driving away a clientele socially frustrated with the non-trusting relationship.[27] In short, this Court believes that one professional's commitment may be worth more in sales volume than a hundred firm orders from a insolvent or dishonest source. A proper critique of this interpretation of "sale" is that such reasoning, if applied in a broader sense across industries, would quickly arrive at an unsustainable breaking point. However, this Court is not broadening the definition of "sale", but simply seeking to understand and apply the definition within this particular industry. *See In Re Novartis Wage and Hour Lit.*, 593 F. Supp. 2d 637, 659 ("Reps make sales in the sense that sales are made in the pharmaceutical industry."). For all of the above reasons, this Court, in performing its own construction and application of this statutory exemption, finds that in the pharmaceutical context, where a representative asks for a commitment from a physician, such activity is sales activity for the purposes of the Pennsylvania outside sales exemption.

Admittedly, this construction and application has its weaker points: obviously, not every sale defined this way will actually result in the delivery of a pharmaceutical in exchange for legal tender. Furthermore, other courts, assessing different industries, have held that individuals seeking to obtain commitments are not necessarily performing exempt sales activity. *See, e.g., Clements v. Serco*, 530 F.3d 1224, 1227 (10th Cir. 2008). Ms. Baum's briefing hopes to

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[27] Such varying business realities exemplify the arbitrariness that could result from a too-narrow definition of sale.

capitalize upon this particular weak point, arguing that even when a physician commits to writing a prescription for AstraZeneca's pharmaceuticals, this commitment is certainly not binding upon either the physician or a patient. However, the rationale of such a critique could be equally applied to sales transactions in simpler fields. For instance, where a hypothetical Mr. Loman sells a widget, but the widget is ultimately returned six months later under a warranty claim, did a sale actually occur? Was the sale binding? Given this country's aggressive implied warranty laws, is any sale ever binding? While the Court is certain that Mr. Loman engaged in the process of making sales or obtaining orders, the question presents itself: is any traditional sale more or less binding than a commitment sought and obtained from a honest and thoughtful physician? Admittedly, in the pharmaceutical context, obtaining a commitment from a doctor may not be a formal, binding contract that inexorably leads to the exchange of goods and services. However, the Court believes such formalities are simply not necessary for a "sale" to occur. The Court notes that private companies perhaps have a wiser approach to discerning what constitutes a sale: rather than wasting effort and energy arguing about how to apply abstract and reduced definitions to diverse industries, such companies simply find and execute the methods that work to increase sales; notably, pharmaceutical companies have all decided to employ large, direct sales forces to visit physicians.

The Court also acknowledges that physicians are not the only customer involved in the sale of pharmaceuticals. However, it cannot be argued that physicians are not an integral and essential gatekeeper within this sales process. In some, likely most,

instances, physicians will be the dispositive force behind a sale. Furthermore, in all instances, a physician's approval and consent to the sale is ultimately necessary. Other courts, in expressing their analyses of this pharmaceutical sales dynamic, have similarly stated the integral role of physicians in the sale of a pharmaceutical. *See Barnick v. Wyeth*, 522 F. Supp. 2d 1257, 1264 (C.D. Cal. 2007) (explaining that because physicians "determine whether or not a patient will buy a prescription product", the physicians themselves are the appropriate target of sales efforts); *see also D'Este v. Bayer Corp.*, No. 07-cv-3206, 2007 U.S. Dist. LEXIS 87229, at *14 (C.D. Cal. Oct. 9, 2007) (emphasizing that the doctor places the order for the prescription product by writing a prescription).

In sum, in a determination unnecessary to present to a jury, and following an analysis of the dynamics of the industry, this Court finds that where pharmaceutical representatives seek to obtain physician commitments to write prescriptions, these representatives make sales and are engaged in the process of making sales for purposes of Pennsylvania's outside sales exemption. In the alternative, this Court notes that a similar analysis could also be applied to pharmaceutical sales representatives "obtaining orders." Consequently, a pharmaceutical sales representative performing duties similar to those performed by Ms. Baum, including visiting the offices of physicians for the purposes of obtaining commitments, meets this requirement of the outside sales exemption.

b. Ms. Baum Exhibits Numerous Indicia of Sales Activity, Confirming that She Was Employed for the Purpose of Making Sales

Having construed an integral term within the at-issue statute, and examined the nature of the industry, the Court now turns to specific relevant matters relating to Ms. Baum's position and actual work efforts. Such indicia of sales confirm the regulation's requirement that the employee be "employed for the purpose of and ... customarily and regularly engaged" in making sales or obtaining orders.[28] Ms. Baum's job exuded an overwhelming number of indicia of sales activity; such indicia, dispositive neither alone nor taken together, nonetheless provide weighty support that classifying Ms. Baum as exempt comports with the legislative purposes for the exemption. Additionally, these indicia of sales serve as strong points demarcating a distinguishing line between Ms. Baum's exempt sales employment and non-exempt promotional activities.

First, of minor significance, Ms. Baum referred to her job as a sales job. She described her function as a Pharmaceutical Sales Specialist as increasing the market share of AstraZeneca's prescription drugs through personal selling. She indicated to others how much she loved being in sales, and initially pursued the position because she "always wanted to be in sales." Also, AstraZeneca advertised and referred to

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[28] These indicia of sales are not alone dispositive, but should be considered after a finding that sales have taken place. *Ruggeri* v. *Boehringer Ingelheim Pharms., Inc.*, 585 F. Supp. 2d 254, 266 (2008).

the positions as sales positions. Both Ms. Baum and AstraZeneca referred to doctors as customers.

Additionally, Ms. Baum's position existed to help increase the sales of AstraZeneca products. Ms. Baum now attempts to argue that it was difficult to trace sales data directly to her own activity, given the extended nature of the above-discussed pharmaceutical purchase regime, and the imprecision of certain metrics used by AstraZeneca to measure sales. However, the Court finds that her arguments are unconvincing in that the record is replete with evidence showing that the purpose of her employ was to increase sales, and that metrics, even if imprecise, were used to track her success.

Importantly, Ms. Baum exhibited substantial discretion and showed creative thought in identifying and persuading high priority physicians within her area. She was responsible for managing and organizing her efforts at calling upon the approximately 150 physicians within her geographic territory. She regularly analyzed reports on various prescription-related data, to aid her in her sales efforts. She set sales goals in relation to her efforts and visits.

Also importantly, Ms. Baum utilized specialized sales training from AstraZeneca to engage doctors in interactive discussions about the doctor's willingness or hesitancy to prescribe AstraZeneca products. The primary purpose of her visits was to obtain, via a persuasive close, a physician's commitment to write more prescriptions for a particular AstraZeneca product. She asked physicians to prescribe AstraZeneca products on every sales call, having been trained specifically in the art of conducting these delicate closing efforts. Ms. Baum also sought to increase her persuasive skills and closing capacity, by

increasing her knowledge about the pharmaceuticals and disease pathways; she even enrolled in outside courses.

Despite the substantial undisputed evidence of such indicia of sales, Ms. Baum, in her filings to the Court, now seeks to characterize her job efforts as simply reading from prepared scripts. However, even if initially planning to work from prepared scripts, Ms. Baum inevitably varied her presentation to effectively appeal to a particular physician. The record contains substantial evidence that Ms. Baum crafted her message to suit her audience, as is necessary in any sales or persuasive situation. Ms. Baum herself now disputes this notion, arguing instead that she simply repeated word for word memorized sales pitches. Yet this overstated, dubious assertion is controverted by numerous other sworn statements and representations that show that interactions with physicians were inevitably individualized. For instance, Baum stated that she focused upon each particular physician's needs and worked to develop her selling skills. Her interactions with physicians varied in length, and she exercised judgment in ascertaining how to most effectively sell AstraZeneca's products. As other courts have founds, such individualized efforts are the hallmark of selling activities. *See, e.g., Menes v. Roche Labs., Inc.*, No. 2:07-cv-01444, 2008 U.S. Dist. LEXIS 4230, at *7 (C.D. Cal. Jan. 7, 2008); *Barnick,* 522 F. Supp. 2d at 1262-63. The Court is satisfied that based upon numerous examples within the record, no reasonable jury could possible agree with Plaintiffs conflicted argument that she was more promotional "pharm-robot" than salesperson.

Furthermore, Ms. Baum was not substantially supervised in her daily activities. Ms. Baum attempts to argue that she followed strict guidelines regarding what she did with her time, including policies governing how to respond to e-mails. However, the undisputed evidence shows that Ms. Baum exercised substantial discretion over the course of her activities, within generalized guidelines put out by AstraZeneca. In particular, Ms. Baum was only accompanied by a supervisor one day every one to two months.

Importantly, Ms. Baum received a bonus of additional compensation on the basis of certain sales metrics. The Court understands Ms. Baum's general compensation package as follows: she received a base salary, which was then supplemented by the FSIP supplemental bonus plan, tied to the total number of prescriptions, or new prescriptions filled within her assigned geography. *See* Doc. Nos. 53 and 63, ¶50. A hallmark of traditional outside sales relationships is the correlation of additional compensation with success in sales efforts. In many outside sales positions, this correlation is direct, meaning Mr. Loman is paid $50 for each widget that he sells. Sometimes, this compensation tied directly to sales may be all that Mr. Loman is paid. In other instances, Mr. Loman may be paid a base salary, with additional compensation being tied to sales. In this instance, Ms. Baum was paid a substantial base salary. However, the record also shows that she received additional compensation that was somehow tied to her sales performance. Ms. Baum emphasizes the attenuated nature of the tying of the bonuses to the performance, due in part to inexact metrics; the Court finds this point, while relevant, is of minimal import. While the tying in this matter is not as direct

as in the above example, it still exists in that Ms. Baum received compensation from AstraZeneca based upon her sales performance. While these above indicia of sales are significant, this Court believes that Ms. Baum's classification as exempt turns upon a correct understanding of the nature of the pharmaceutical selling process. Having conducted that analysis, this Court found that making sales or obtaining orders in the pharmaceutical industry consists of obtaining commitments from doctors. Now, as adjunctive support of that finding, and as evidence that Ms. Baum was employed for the purpose of making sales, the Court further finds that Ms. Baum exhibited nearly every significant indicia of sales activity; these indicia correspond with both the necessary line-drawing around the exemption, and the exemption's purposes. The exemption for outside sales activity exists in part due to the recognition of such salespeople as professionals possessing substantial bargaining power, and the further recognition that the nature of their work does not lend itself to supervision or specific hour requirements or limits. These rationales, representing the purpose and function of the outside sales exemption, and are easily met on these facts.

c. Ms. Baum Spent Ninety Percent of Her Time Making Calls in the Field

Ms. Baum meets the second and third requirements of the outside sales exemption: the undisputed facts show that she was "customarily and regularly engaged more than 80% of work time away from the employer's place or places of business," and that she spent less than twenty percent of her work time performing non-exempt work. *See* 34 Pa. Code § 231.85(2). Non-exempt work is "work of a nature

not directly related to and in conjunction with the making of sales." *Id.* Ms. Baum admitted that she spent ten to twelve hours per day in the field, making calls upon physicians. Ms. Baum further acknowledged spending only one hour per day at home, organizing her efforts. As a side issue, the Court believes that such organizing efforts are also exempt because they are directly related to her sales efforts. Regardless, though, Ms. Baum without question meets both time-oriented qualifications.

2. Conclusion: Ms. Baum Meets all Requirements of Pennsylvania's Outside Sales Exemption

This Court finds that upon the submitted evidence, no jury could reasonably find that Ms. Baum does not fit within the "outside sales" exemption. Nearly seventy years ago, in interpreting the analogous outside sales exemption in the Fair Labor Standard Act, the Tenth Circuit aptly explained the rationale behind this exemption:

> The reasons for excluding an outside salesman are fairly apparent. Such salesmen, to a great extent, work**** individually. There are no restrictions respecting the time he shall work and he can earn as much or as little, within the range of his ability, as his ambition dictates. In lieu of overtime, he ordinarily receives commissions as extra compensation. He works away from his employer's place of business, is not subject to the personal supervision of his employer, and his employer has no way of knowing the number of hours he works per day. To apply hourly standards primarily devised for an employee on a fixed hourly wage is incompatible

with the individual character of the work of an outside salesperson.

Jewel Tea Co. v. Williams, 118 F.2d 202, 207-08 (10th Cir. 1941). This rationale for the FLSA outside sales exemption, as stated by the Tenth Circuit, remains viable today and is equally applicable to the Pennsylvania exemption; given that Ms. Baum exemplifies many of the attributes that drive the policy of the exemption, applying the exemption to her comports fully with the exemption's spirit, and the spirit behind the wage laws generally.

Ms. Baum, for purposes of this litigation, seeks to characterize her previous role as that of a mere "pharm-robot." The Court and the record disagree with this post-hoc characterization. The selling process, whether in pharmaceuticals, as detailed in the record in this matter, or any other field, is iterative, imaginative, challenging and demanding. Sales are the single undeniable limiting force in the growth and progress of nearly every company in the modern economy. No one can honestly say that a salesperson is effective simply by spitting out a memorized script; no one can imagine a company that would require rote adherence to planned words in any situation. Instead, successful companies acknowledge that an effective salesperson must exemplify the following abilities: talent for building personal relationships of trust; skill at effectively and concisely portraying a complicated message; knowledge and communication skills to overcome concerns; and pure charisma, required to effectively close. Such skills will always be in high demand.

The effective salesperson may be helpfully compared to a master fly fisherman: prepared with the appropriate tools, learned in the subject matter, and

dedicated beyond the understanding of outsiders. Each possesses a similar innate and unteachable talent: the fisherman pulls the hook at precisely the right time, tension and speed, just as a master salesperson conducts a close that effortlessly but firmly ensures a sale. Importantly, Ms. Baum prepared for and conducted closes, wherein she obtained commitments from doctors to prescribe AstraZeneca products.

In short, salespeople, including Ms. Baum, are professionals whose absence from the office makes it impossible, even with the magical advances of modem technology, to carefully supervise their hours. Furthermore, such professionals have sufficient leverage to negotiate excellent pay packages. The awareness of these attributes of salespeople led to Pennsylvania's adoption of an outside salesperson exception similar to that of the FLSA. Neither semantics nor overly narrow statutory constructions should be allowed to devalue such sales professionals by forcing upon them uniform and limiting labor protections; rather, professional salespeople are better left to negotiate their own contractual relationships, fending for themselves in their terms of employ, just as they do on calls in the field.

In sum, the Court concludes that Ms. Baum was directly engaged in "making sales" and obtaining orders, and meets all necessary requirements of Pennsylvania's outside salesperson exemption. Furthermore, the Court finds that there are no disputed material facts that could materially affect whether Ms. Baum should be seen as exempt.

B. In the Alternative. Ms. Baum's Would Likely Qualify for Pennsylvania's Administrative Exemption

As an alternative basis of decision, should Ms. Baum not be properly classified as an outside salesperson, the Court would likely find that Ms. Baum would still be exempt under Pennsylvania's administrative exemption. *See* 43 P.S. § 333.1 05(5); 34 Pa. Code § 231.83; *see also Cote v. Burroughs Welcome Co.*, 558 F. Supp. 883, 885 (E.D. Pa. 1982) (finding that the administrative exemption is applicable to pharmaceutical representatives who call on physicians with the purpose of increasing sales). In particular, this Court would adopt an analysis similar to that expertly executed by the District of New Jersey, in *Smith v. Johnson and Johnson*, No. 06-cv-4787, 2008 WL 5427802 (D.NJ. Dec. 30, 2008) (holding that a pharmaceutical sales representative was properly classified as exempt under the FLSA's administrative exemption).

Other persuasive cases have also held that pharmaceutical sales representatives meet administrative exemptions of the FLSA and other state laws. *See, e.g., In re Novartis Wage and Hour Lit*, 593 F. Supp. 2d 637 (S.D.N.Y. 2009); *Amendola v. Bristol-Myers Squibb*, 558 F. Supp. 2d 459, 470 (S.D.N.Y. 2008); *Cote v. Burroughs Wellcome Co.*, 558 F. Supp. 883 (E.D. Pa. 1982) (finding that FLSA's administrative exemption applied to a pharmaceutical company's detail persons).

Ms. Baum meets each prong of the relevant test. Her annual salary translates into $1211.54 per week, far more than that required. Furthermore, her sales and promotion efforts constitute nonmanual work directly related to the general operation of her em-

ployer. Such general operations include the "administrative operations of a business", including "representing the company [and] promoting sales." 29 C.F.R. § 205(c)(5)(2004). Finally, as discussed above, Ms. Baum, as required by the demanding task of any professional salesperson, exercised substantial discretion and independent judgment in organizing and executing her sales efforts. *See Wolfslayer v. Ikon Office Solutions, Inc.*, 2005 WL 18193, at *10 (E.D. Pa. Jan. 26, 2005)(explaining the relatively light standard for a job to require discretion and independent judgment).

C. Court Need Not Reach Issue of Preemption

Because of the findings above, the Court sees no reason to discuss any of Defendant's preemption arguments.

D. Other Pending Motions are Moot

Because of the Court's decision on Defendant's Motion for Summary Judgment, the three other pending motions in this matter (Doc. Nos. 19, 49 and 69) are hereby denied as moot, since the Court is without power to hear them, as their resolution could not affect the rights of the litigants in this matter. *See Surrick v. Killion*, 449 F.3d 520, 526 (3d Cir. 2006).

IV. CONCLUSION

In conclusion, the Court finds that this decision properly applies both the text and purpose of the Pennsylvania exemption at issue. While the dividing line between non-exempt promotion and exempt sales may be difficult to draw, pharmaceutical sales representatives who perform job duties similar to those

of Ms. Baum should be an easy case. The federal regulations enacted in relation to FLSA legislation emphasize the transaction itself; this Court's Opinion honors that emphasis by finding that obtaining a commitment from a physician, in the pharmaceutical sales context, is sufficient to constitute "making sales" or "obtaining orders." Past judicial emphasis upon the need for narrow construction of exemptions does not obviate the need for common-sense construction and applications.

Furthermore, in reviewing approximately ten other recent district court cases addressing similar situations, even though applying either federal or another state's law, nearly all found, for one reason or another, that the pharmaceutical salespeople at issue were exempt. The district judges in these cases exhibit the wisdom and common sense to acknowledge that sometimes, society is better off when a duck, walking and talking so, can simply be treated as one. Thus, Ms. Baum's job duties fit within the letter, but more especially the spirit of the exemption. As acknowledged by the existence of the exemption, the nature of the work performed by Ms. Baum sales does not lend itself to easy management or supervision; furthermore, competent and talented sales professionals, such as Ms. Baum, do not and should not be characterized and limited as a protected class having little bargaining power in relation to their employers. In sum, after considering the multitude of policy reasons as to why outside salespeople are exempt, the Court believes that Ms. Baum instantiates nearly all such rationales.

Furthermore, the Court finds that a trial would be superfluous, as a jury's resolution of any disputed facts in this matter would not change the outcome;

under the undisputed material facts, Defendant AstraZeneca is entitled to judgment as a matter of law. An appropriate Order follows.

AND NOW, this 31st day of March, 2009, in accordance with the above analysis, IT IS HEREBY ORDERED THAT Defendant's Motion for Summary Judgment (Doc. No. 52) is GRANTED. IT IS FURTHER ORDERED that the following motions, Defendant's Motion to Strike (Doc. No. 19), Plaintiffs Motion to Certify Class (Doc. No. 49), and Plaintiffs Motion to Strike (Doc. No. 69), are DENIED as moot.

BY THE COURT:

/s/ KIM R. GIBSON
KIM R. GIBSON,
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

KRISTEN BAUM, on behalf of herself and all others similarly situated,

CIVIL ACTION NO. 3:2007-cv-90

Plaintiff,

v.

JUDGE KIM R. GIBSON

ASTRAZENECA LP

Defendants.

ORDER

And Now, this 9th Day of April, 2009, pursuant to Federal Rule of Civil Procedure 60(a), the Court hereby exercises its discretion to correct a clerical mistake in its Judgment Order dated March 31, 2009 (Doc. No. 89). That Order incorrectly stated that "... Judgement is hereby entered in favor of the Defendant. AstraZeneca LP, and against the Plaintiff, Kristin Baum, *on behalf of herself and others similarly situated.*" (emphasis added). Because the Court neither certified a class, nor considered the class certification issue, the Court intended to issue judgment only as to Plaintiff Kristin Baum. However, this intent was obscured by the language used in the Order.

Therefore, the Court's Order of Judgment of March 31, 2009 (Doc. No. 89) is hereby amended to read as follows: "And Now, this 31st day of March, 2009, in

accordance with Federal Rule of Civil Procedure 58, and Memorandum Opinion and Order dated March 31, 2009, Judgment is hereby entered in favor of the Defendant, AstraZeneca LP, and against the Plaintiff, Kristin Baum."

BY THE COURT

/s/ KIM R. GIBSON
UNITED STATES DISTRICT JUDGE

APPENDIX F

The regulatory test for the Pennsylvania Mininum Wage Act (PMWA) "Administrative" exemption set forth at 34 Pa. Code § 231.83 provides:

> Employment in a bona fide administrative capacity means work by an individual:
>
> (1) Whose primary duty consists of the performance of office or nonmanual work directly related to management policies or general operation of his employer or the customers of the employer.
>
> (2) Who customarily and regularly exercises discretion and independent judgment.
>
> (3) Who regularly and directly assists an employer or an employee employed in a bona fide executive or administrative capacity, who performs under only general supervision work along specialized or technical lines requiring special training, experience or knowledge, or who executes under only general supervision special assignments and tasks.
>
> (4) Who does not devote more than 20% of time worked in a workweek, or, in the case of an employee of a retail or service establishment, who does not devote more than 40% of time worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (1)--(3).
>
> (5) Who is paid for his services a salary of not less than $155 per week, exclusive of board, lodging, or other facilities, provided that an

> employee who is compensated on a salary or fee basis at a rate of not less than $250 per week, exclusive of board, lodging or other facilities and whose primary duty consists of the performance of work described in paragraph (1), which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all of the requirements of this section.

The regulatory test for the PMWA "Outside Salesman" exemption at 34 Pa. Code § 283.85 states:

> Outside salesman means an employee who is employed for the purpose of and who is customarily and regularly engaged more than 80% of work time away from the employer's place or places of business in the following manner:
>
> (1) Making sales, including any sale, exchange, contract to sell, consignment for sale, or other disposition or selling, and delivering articles or goods.
>
> (2) Obtaining orders or contracts for the use of facilities for which a consideration will be paid by the client or customer. In addition, the employee may not spend more than 20% of the hours worked in any week in work of a nature not directly related to and in conjunction with the making of sales; provided however, that work performed incidental and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be not regarded as nonexempt work.

The federal regulations promulgated pursuant to the Fair Labor Standards Act (FLSA) define "discretion and independent judgment" as follows:

> (a) To qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term "matters of significance" refers to the level of importance or consequence of the work performed.
>
> (b) The phrase "discretion and independent judgment" must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have

significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

(c) The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level. Thus, the term "discretion and independent judgment" does not require that the decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. For

example, the policies formulated by the credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies. The management consultant who has made a study of the operations of a business and who has drawn a proposed change in organization may have the plan reviewed or revised by superiors before it is submitted to the client.

(d) An employer's volume of business may make it necessary to employ a number of employees to perform the same or similar work. The fact that many employees perform identical work or work of the same relative importance does not mean that the work of each such employee does not involve the exercise of discretion and independent judgment with respect to matters of significance.

(e) The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. See also § 541.704 regarding use of manuals. The exercise of discretion and independent judgment also does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work. An employee who simply tabulates data is not exempt, even if labeled as a "statistician."

(f) An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the

> employer will experience financial losses if the employee fails to perform the job properly. For example, a messenger who is entrusted with carrying large sums of money does not exercise discretion and independent judgment with respect to matters of significance even though serious consequences may flow from the employee's neglect. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

29 C.F.R. § 541.202 (2004)

The federal regulations promulgated pursuant to the Fair Labor Standards Act define "making sales or obtaining orders," as follows:

> (a) Section 541.500 requires that the employee be engaged in:
>
> (1) Making sales within the meaning of section 3(k) of the Act, or
>
> (2) Obtaining orders or contracts for services or for the use of facilities.
>
> (b) Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that "sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

> (c) Exempt outside sales work includes not only the sales of commodities, but also "obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer." Obtaining orders for "the use of facilities" includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies.
>
> (d) The word "services" extends the outside sales exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order.

29 C.F.R. § 541.501 (2004)

The federal regulations promulgated by the Secretary of Labor pursuant to the FLSA define "promotion work" as:

> (a) Promotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work. An employee who does not satisfy the requirements of this

subpart may still qualify as an exempt employee under other subparts of this rule.

(b) A manufacturer's representative, for example, may perform various types of promotional activities such as putting up displays and posters, removing damaged or spoiled stock from the merchant's shelves or rearranging the merchandise. Such an employee can be considered an exempt outside sales employee if the employee's primary duty is making sales or contracts. Promotion activities directed toward consummation of the employee's own sales are exempt. Promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work.

(c) Another example is a company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, sets up displays and consults with the store manager when inventory runs low, but does not obtain a commitment for additional purchases. The arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is incidental to and in conjunction with the employee's own outside sales. Because the employee in this instance does not consummate the sale nor direct efforts toward the consummation of a sale, the work is not exempt outside sales work.

29 C.F.R. § 541.503 (2004)

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 09-0437

IN RE NOVARTIS
WAGE AND HOUR LITIGATION

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR THE SECRETARY OF LABOR AS
AMICUS CURIAE IN SUPPORT OF
PLAINTIFFS-APPELLANTS

Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of the Plaintiffs-Appellants. The district court committed legal error when it concluded that the Plaintiffs-Appellants, Pharmaceutical Sales Representatives ("Reps") employed by Novartis Pharmaceutical Corporation ("NPC"), are exempt from the overtime requirements of the Fair Labor Standards Act (" FLSA" or "Act") under the "outside sales" exemption or, alternatively, the "administrative" exemption. *See* 29 U.S.C. 213(a)(1).

STATEMENT OF INTEREST OF THE SECRETARY OF LABOR

The Secretary administers and enforces the FLSA, *see* 29 U.S.C. 204(a) and (b), 211(a), 216(c), 217, and has a compelling interest in ensuring that it is interpreted correctly. By concluding that the Reps are exempt as outside salespersons despite the fact that they do not engage in any sales, the district court failed to follow the Department of Labor's ("Department's") regulatory provisions limiting the exemption to employees who make sales or obtain orders or contracts for services for which a consideration will be paid by the client or customer. *See* 29 C.F.R. 541.500. Moreover, the court's conclusion that the Reps, who are given lists of physicians to visit and are not allowed to go beyond the messages crafted by NPC (as set out in scripts and related materials with which they are provided), are exempt administrative employees is inconsistent with the regulatory requirement that employees must exercise discretion and independent judgment with respect to matters of significance in order to qualify for the administrative exemption. *See* 29 C.F.R. 541.200(a)(3).

STATEMENT OF THE ISSUES

(1) Whether the district court erred by concluding that the Reps are exempt outside salespersons despite the fact that they do not "make sales" as required by the Department's "outside sales" regulations.

(2) Whether the district court erred by concluding that the Reps are exempt administrative employees in accordance with the Department's "administrative exemption" regulations, which limit the exemption to

employees who exercise discretion and independent judgment with respect to matters of significance.

STATEMENT OF FACTS

The plaintiffs in this case are a class of over 2,500 Reps who worked for NPC in New York, California, and other states. The Food and Drug Administration ("FDA") prohibits Reps from selling drugs to physicians, *see In Re Novartis*, 593 F. Supp. 2d 637, 642 (S.D. N.Y. 2009); their primary duty is to call on physicians and provide them with information about NPC's drugs. *Id.* at 641. The goal of providing the physicians with this information is to convince them to prescribe NPC's drugs to their patients. *Id.*[1]

NPC trains the Reps in sales techniques as well as giving them basic training in pharmacology and other relevant subjects. *Id.* NPC expects the Reps to deliver a "core message" about the drugs to each physician, and provides them with scripts and other materials to help them do so. *Id.* They may not elaborate on the messages crafted by NPC, such as making claims about a drug's effectiveness, absent NPC authorization. *Id.* NPC also provides the Reps with materials to use in their presentations, such as pamphlets, clinical studies, and visuals aids, together with instructions on how these materials should be utilized; Reps may not use other materials unless NPC has cleared them. *Id.*[2] Within these stringent parameters,

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[1] The patient does not purchase the prescribed drugs from a physician, but rather from a pharmacy. NPC sells its drugs directly to distributors, who in turn sell them to pharmacies, who then sell them to patients with prescriptions (Oral Argument Transcript, Nov. 18, 2008 at 5:9-10).

[2] If a Rep does not have a scripted response from NPC to a physician's concerns, she must try to "sidestep" the question by

the Reps "tailor" their presentations to each physician based on such considerations as the amount of time the physician is willing to meet with the Rep, the physician's patient base and prescribing habits, and the physician's personality. *Id.* at 642. NPC also provides the Reps with a budget for organizing informational events for their target physicians, following NPC guidelines for speakers and invitees. *Id.*

Each Rep is assigned a target list of physicians to call on; Reps may not remove or add physicians to their list without NPC's consent, and are reprimanded for failing to adhere to their target lists (Plaintiffs-Appellants' Statement of Facts (" SOF") at ¶¶ 37-40). NPC also assigns the Reps specific drugs to promote. *In Re Novartis*, 593 F. Supp. 2d at 641. Although NPC does not directly supervise the Reps, it expects them to call on a certain number of physicians on their list between 8 a.m. and 5 p.m. each weekday, determines how often Reps should call on each physician, and ranks each physician and drug in order of importance for each Rep (Plaintiffs-Appellants SOF at ¶ 37). *Id.* at 642. NPC also expects the Reps to "close" each physician visit by requesting a non-binding commitment to prescribe NPC drugs to their patients when appropriate or, in other cases, giving a physician a clinical study to review or thanking the physician for his time. *Id.* The Reps earn an average annual "salary" of $91,500 that includes both base pay and "incentive payments" based on the number of prescriptions written by physicians. *Id.*

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restating the "core message" or refer the physician to medical experts and NPC (Plaintiffs-Appellants SOF at ¶¶ 77-78).

SUMMARY OF ARGUMENT

Under the Department's regulations, the Reps do not meet the requirements for either the outside sales or administrative exemption. The Reps do not sell or take orders for NPC's drugs; rather, they provide information to target physicians about NPC's drugs with the goal of persuading the physicians to prescribe those drugs to their patients. The actual sale of drugs takes place between NPC and pharmacies. Although the Reps' duties bear some of the indicia of sales -- they use methods of persuasion similar to those of salespersons, they receive some of their compensation in the form of bonus or incentive payments, and their promotion work affects NPC's actual drug sales -- the fact that the Reps do not actually "make sales" conclusively demonstrates that the position is not that of an outside salesperson consistent with the Department's legislative rules.

Furthermore, when promoting the drugs to the physicians, the Reps are not permitted to deviate from the "core message" found in the scripts, manuals, brochures, and other materials NPC provides them. If the Reps do not have a scripted response to a physician's question, they are required to either reiterate the "core message" or refer the physician to NPC's medical experts. These constraints on the Reps' primary duties demonstrate that, although the Reps have some discretion (such as deciding what time of day to see which physician, tailoring their message to a physician's personality or time constraints, and deciding whether to ask for a non-binding commitment at the end of a visit), they do not exercise discretion and independent judgment with respect to matters of significance. Thus, the Reps do not qualify for the administrative exemption.

ARGUMENT

I. THE DISTRICT COURT ERRED BY CONCLUDING THAT THE REPS ARE EXEMPT OUTSIDE SALESPERSONS DESPITE THE FACT THAT THEY DO NOT "MAKE SALES" AS REQUIRED BY THE DEPARTMENT'S "OUTSIDE SALES"

Section 13(a)(1) of the FLSA provides a complete exemption from the overtime pay requirement for "any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman[,] as such terms are defined and delimited from time to time by regulations of the Secretary[.]" 29 U.S.C. 213(a)(1). The Act's "exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those [cases] plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *see Bilyou v. Dutchess Beer Distribs., Inc.*, 300 F.3d 217, 222 (2d Cir. 2002).

Pursuant to Congress's express delegation of rulemaking authority, the Secretary issued revised regulations after notice and comment that "define and delimit" the FLSA's overtime exemptions. *See* 69 Fed. Reg. 22,122 (Apr. 23, 2004). As such, they are entitled to controlling deference. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843-44 (1984); *see also Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 165-68, 171-74 (2007); *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S.

967, 980 (2005); *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001).[3]

1. As noted *supra*, section 13(a)(1) of the FLSA provides an exemption from the statute's minimum wage and overtime requirements for "any employee employed . . . in the capacity of outside salesman." The Department's regulations define that phrase as including "any employee . . . whose primary duty is . . . making sales within the meaning of section 3(k) of the Act, or . . . obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer." 29 C.F.R. 541.500(a)(1)(i)-(ii).[4] "Primary duty" means "the principal, main, major, or most important duty that the employee performs," 29 C.F.R. 541.700, and section 3(k) of the FLSA defines "sale" as "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C.

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[3] To the extent that the plain language of the Department's outside sales or administrative regulations are ambiguous, courts must give controlling deference to the Department's interpretation of its own regulations unless such interpretation is plainly erroneous or inconsistent with those regulations. *See Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1155 (2008); *Auer v. Robbins*, 519 U.S. 452, 461 (1997). This principle holds true whether the Secretary's interpretation is found in a Preamble to a final rule published in the Federal Register, an opinion letter or other interpretive materials, or in a legal brief. *See, e.g., Coke*, 551 U.S. at 171 (controlling deference to Department's Advisory Memorandum issued during the course of litigation); *Auer*, 519 U.S. at 462 (controlling deference to legal brief).

[4] It is clear that the Reps are "customarily and regularly engaged away from" NPC's place of business. 29 C.F.R. 541.500(a)(2).

203(k); *see* 29 C.F.R. 541.501.[5] The Department's regulations further explain that "[s]ales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property," and that "services" "extends the outside sales exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order." 29 C.F.R. 541.501(b) and (d).

The regulations also explain the relationship between promotional work and the outside sales exemption, clarifying that

> [p]romotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promctional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work.

29 C.F.R. 541.503(a). In other words, "[p]romotion activities directed toward consummation of the em-

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[5] Contrary to the conclusions of two recent district court decisions, the Reps' activities do not come within the "other disposition" language found in section 3(k). *See Schaefer-LaRose v. Eli Lilly & Co.*, S.D. Ind. No. 07-1133 (Sept. 29, 2009); *Delgado v. Ortho-McNeil, Inc.*, 2009 WL 2781525 (C.D. Cal. Feb. 6, 2009). The term "other disposition" must be read in the context of the language that precedes it, i.e., in the context of making some kind of a sale. The most the Reps can obtain is a non-binding commitment from a physician to prescribe NPC drugs as appropriate.

ployee's own sales are exempt. Promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work." 29 C.F.R. at 541.503(b).

Thus, under the plain language of the Department's regulations, the Reps do not meet the primary duties test for the outside sales exemption.[6] Because the Reps do not sell any drugs or obtain any orders for drugs, and can at most obtain from the physicians a non-binding commitment to prescribe NPC's drugs to their patients when appropriate, the Reps do not meet the regulation's plain and unmistakable requirement that their primary duty must be "making sales." 29 C.F.R. 541.500(a)(1)(i). Contrary to the district court's assertion that "Reps make sales in the sense that sales are made" in the pharmaceutical industry, *In Re Novartis*, 593 F. Supp. 2d at 650, the actual sale of NPC's drugs occurs between the company and distributors (and then to the pharmacy).[7] Insofar as the Reps' work increases NPC's sales, it is non-exempt promotional work "designed to stimulate

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[6] "A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations." 29 C.F.R. 541.2. Therefore, contrary to the district court's suggestions in *In Re Novartis*, 593 F. Supp. 23 at 654 n.7., the fact that NPC "hired, trained, paid, and incentivized [the Reps] as sales personnel" is not in any way dispositive.

[7] Even if it is true that absent a prescription no drugs would be sold to patients, *see In Re Novartis*, 593 F. Supp. 2d at 650, it nonetheless is "irrelevant to the dispositive inquiry of whether [Reps] make sales of those products as defined in the FLSA." *Kuzinski, et al. v. Schering Corp.*, 604 F. Supp. 2d 385, 398 (D. Conn. 2009) (internal quotation marks omitted).

sales that will be made by someone else." 29 C.F.R. 541.503(b).

2. To the extent, however, that there is any ambiguity on this point in the Department's regulations, the Department's Wage and Hour Division has consistently reiterated its position that a "sale" for the purposes of the outside sales exemption requires a consummated transaction directly involving the employee for whom the exemption is sought.[8] For example, Wage and Hour rejected the application of the outside sales exemption to individuals soliciting charitable contributions, noting that "[s]oliciting promises of future charitable donations or 'selling the concept' of donating to a charity does not constitute 'sales' for purposes of the outside sales exemption . . . . [These] solicitors do not obtain orders or contracts for services or for use of your client's facilities for which a consideration will be paid." WH Opinion Letter FLSA 2006-16, 2006 WL 1698305; *see* WH Opinion Letter August 19, 1994, 1994 WL 1004855 (concluding that soliciting organ and tissue donors by selling the concept of being a donor does not constitute "sales" under the regulations). Further, Wage and Hour's Field Operations Handbook ("FOH") states that "[a]n employee whose duty is to convince a

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[8] In the context of addressing the "retail or service establishment" criteria of the FLSA's section 7(i) exemption, *see* 29 U.S.C. 207(i), Wage and Hour noted when discussing the definition of "sale" in section 3(k) of the FLSA that "[t]hough the term sale does not always have a fixed or invariable meaning, it is generally held to be a contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought or sold." WH Opinion Letter FLSA 2005-06, 2005 WL 330605 (citing *Wirtz v. Charleston Coca-Cola Bottling Company, Inc.*, 237 F. Supp. 857 (E.D.S.C. 1965)) (internal quotation marks omitted).

dealer of the value of his employer's service to the dealer's customers and who does not in fact obtain firm orders or contracts from either the dealer or his customers is not making sales within the meaning of FLSA Sec. 3(k)." FOH § 22e04 (1965).

3. This Court has not addressed the question whether Reps are exempt as outside salespersons.[9] Within the Second Circuit, the district courts that have addressed the question have, with the exception of the decision in the instant case, concluded that the outside sales exemption does not apply to Reps because they do not make sales as required by the Department's regulations. *See Kuzinski*, 604 F. Supp. 2d. at 403 (" Because [the Reps] undisputedly do not sell or make any sales as those terms are defined in the FLSA and its implementing regulations, they fall

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[9] No circuit court has addressed this specific question. There are, however, cases involving the application of the outside sales and administrative exemptions pending in the Third and Ninth Circuits. In Smith v. Johnson & Johnson, No. 09-1223, now before the Third Circuit on appeal, the district court determined that the outside sales exemption does not apply to Reps because they do not "make sales," but that they are exempt administrative employees who exercise discretion as to matters of significance. *See Smith v. Johnson & Johnson*, 2008 WL 5427802, at *11-12 (D. N.J. Dec. 30, 2008). Currently before the Ninth Circuit are two cases in which the Central District of California concluded that Reps are exempt as outside salespersons. *See Yacoubian v. Ortho-McNeil Pharmaceutical Corp.*, Ninth Cir. No. 09-55225 (No. 07-127, C.D. Cal. Feb. 6, 2009); *Delgado v. Ortho-McNeil Primary Care, Inc.*, Ninth Cir. No. 09-55229 (No. 07-263, C.D. Cal. Feb. 6, 2009); cf. *D'Este v. Bayer Corp.*, 565 F.3d 1119 (9th Cir. 2009) (certifying to California Supreme Court the question whether the Central District of California correctly concluded that Reps are exempt outside salespersons under California state law; the district court's decisions relied in part on its interpretation of the FLSA's requirements).

outside the FLSA's outside sales exemption.") (internal quotation marks omitted); *Ruggeri v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 585 F. Supp. 2d 254, 272 (D. Conn. 2008) (" Because [the pharmaceutical company] has not shown that [the Reps] make sales or obtain contracts or orders, the outside sales exemption is inapplicable."); *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459, 470 (S.D.N.Y. 2008) ("As a starting point, the interpretation of the [FLSA outside sales] exemption rests on the plain meaning of the statutory and regulatory texts that define it.").

The district court here relied upon this Court's statement in an FLSA "salary basis" case that "[g]iven the broad scope of the FLSA and its implementing regulations, [the Department's] regulations provide only general guidance to accommodate the varying needs of employers and employees in a diverse and varied national economy," *see Havey v. Homebound Mortgage, Inc.*, 547 F.3d 158, 163 (2d Cir. 2008), for its conclusion that it could "take[] into account the characteristics of the industry in question when determining the applicability of the outside sales exemption." *In Re Novartis*, 583 F. Supp. 2d at 649. As noted by the district court in *Kuzinski*, however, "that observation . . . does not mean that an exemption to an employer's obligation to pay overtime under the FLSA can apply more broadly than the regulations specify." 604 F. Supp. 2d at 397 (internal quotation marks omitted).[10] "The conclusion

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[10] This Court, despite referring to the "general guidance" provided by the regulations, did not ignore what the regulations plainly and specifically prescribe. *See Havey*, 547 F.3d at 163-64 ("[T]he regulations specify that a salaried employee must be paid a fixed and predetermined amount . . . but do not prescribe

that [Reps] fall within the outside sales exemption from FLSA's overtime provisions on the basis of the characteristics of the industry in question . . . notwithstanding [the Reps'] lack of capacity to sell, and physicians' lack of capacity to purchase" is an attempt at "back-fitting . . . the FLSA to industry practices." *Id.* at 399 (internal quotation marks omitted); *see Ruggeri*, 585 F. Supp. 2d at 267 ("The justification for the pharmaceutical industry's use of [Reps] and direction of their efforts at physicians based on the artifact of medical and drug regulation . . . does not provide justification for applying the outside sales exemption to [the Reps], especially given that FLSA exemptions apply only to those employees who are plainly and unmistakably within them.") (internal quotation marks omitted).

As noted by the Tenth Circuit, "[t]he touchstone for making a sale, under the [Department's regulations], is obtaining a commitment." *Clements v. Serco*, 530 F.3d 1224, 1227 (2008) (concluding that civilian military recruiters are not within the outside salesperson exemption even though they "engaged in sales training and 'sold' the idea of joining the Army to potential recruits," because they did not engage in sales work as defined by the Department's regulations). In a similar situation to that presented here, the district court in *Kuzinski* concluded:

> [T]he closest that [Reps] come to consummating "sales" is increasing the overall demand for its products, such that [other company] employees negotiate and commit to contracts with wholesalers -- not the physicians to whom [the com-

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when or how frequently this fixed element of compensation may be determined . . . .").

> pany's] products are promoted. An employee does not consummate a "sale" for purposes of the FLSA merely by "lay[ing] the groundwork" for another employee to obtain a customer's commitment. . . . To the extent [the Reps] lay foundation or groundwork, it is to increase or maintain their employer's market share for the products they promote. In this sense they pave the way for sales but in no more direct a manner as a pharmaceutical company's direct-to-consumer advertising, which raises demand for that company's products. Neither of these activities constitutes "sales" under the FLSA.

604 F. Supp. 2d at 399 (citing *Clements*, 530 F.3d at 1229).

4. The cases cited by the district court as support for its conclusion that the Reps "make sales" are inapposite. In *Gregory v. First Title of America, Inc.*, 555 F.3d 1300, 1308-10 (2009), the Eleventh Circuit concluded that a "Marketing Director" was an exempt outside salesperson because she obtained orders for title insurance services. In contrast to the instant case, there was no "evidence of any other intervening sales effort between [the Marketing Director] and orders placed with [her employer]"; once she obtained the order for title insurance services, the sale was complete. *Id.* at 1309. The First Circuit case cited by the district court, *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 47 (2008), *cert. denied*, 129 S.Ct. 2864 (2009), involved the question whether Reps (which that court referred to as "detailers") were entitled to access to "patient-identifiable and prescriber-identifiable data" about prescriptions written in New Hampshire. Although the First Circuit referred to the Reps effect in increasing the pharmaceutical companies' market

share, the question of pharmaceutical sales, in relation to the FLSA or any other law, was not before it. Similarly, although the district court in *Medtronic, Inc. v. Gibbons*, 527 F. Supp. 1085 (D. Minn. 1981), *aff'd*, 684 F.2d 565 (8th Cir. 1982), described the employees of cardiac pacemaker manufacturers' who promoted the pacemakers to physicians as "sales representatives" and their work in terms of "sales," the issue implicated in that case was a covenant not to compete, not the FLSA's outside sales exemption. *Id.* at 1094-95. The court was interpreting the term "customer" under applicable contract construction (i.e., the customers with whom Gibbons had contact in the year immediately preceding his employment with the employer), not the term "sale" under the FLSA or, more specifically, what is required before an employer may avail itself of the outside sales exemption.

II. THE DISTRICT COURT ERRED BY CONCLUDING THAT THE REPS ARE EXEMPT ADMINISTRATIVE EMPLOYEES IN ACCORDANCE WITH THE DEPARTMENT'S "ADMINISTRATIVE EXEMPTION" REGULATIONS, WHICH LIMIT THE EXEMPTION TO EMPLOYEES WHO EXERCISE DISCRETION AND INDEPENDENT JUDGMENT WITH RESPECT TO MATTERS OF SIGNIFICANCE

1. The employer failed to show that the Reps exercise discretion and independent judgment with respect to matters of significance. Under the Department's administrative exemption regulations, an "employee employed in a bona fide administrative capacity" means "any employee . . . whose primary duty is the performance of office or non-manual work

directly related to the management or general business operations of the employer or the employer's customers . . . [and] . . . [w]hose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. 541.200(a)(2)-(3).[11] The requirement that the employee's primary duty include the exercise of discretion and independent judgment "involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term 'matters of significance' refers to the level of importance or consequence of the work performed." 29 C.F.R. 541.202(a). Furthermore, the phrase "discretion and independent judgment" must be applied in the light of all the facts involved in the particular employment situation, with the following factors to be considered:

> whether the employee has authority to formulate, affect, interpret, or implement management

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[11] In order to fall within the administrative exemption, the employee must also meet the salary requirement of $455 per week. *See* 29 C.F.R. 541.200(a)(1). The salary requirement is not at issue in this case. Further, because the Reps do not satisfy the "discretion and independent judgment with respect to matters of significance" prong of the administrative exemption, this brief does not address whether the Reps' "primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers." 29 C.F.R. 541.200(a)(2) and (3).

[12] As the Preamble to the final rule, 69 Fed. Reg. 22,143 (Apr. 23, 2004), explained, federal courts generally find that employees who meet at least two or three of the indicators mentioned in 29 C.F.R. 541.202(b) are deemed to be exercising discretion and independent judgment with respect to matters of significance, although a case-by-case analysis is required.

> policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

29 C.F.R. 541.202(b).[12] Although this list is not exhaustive, it indicates the kind of activities that constitute "matters of significance."

Moreover, the exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures, or specific standards described in manuals or other

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[12] As the Preamble to the final rule, 69 Fed. Reg. 22,143 (Apr. 23, 2004), explained, federal courts generally find that employees who meet at least two or three of the indicators mentioned in 29 C.F.R. 541.202(b) are deemed to be exercising discretion and independent judgment with respect to matters of significance, although a case-by-case analysis is required.

sources. *See* 29 C.F.R. 541.202(e); *see also* 541.203(g)-(i) (clarifying through examples of exempt and non-exempt administrative employees that reliance on techniques and skills developed through specialized training and use of manuals is insufficient for application of the exemption). The regulations also clarify that "[a]n employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly." 29 C.F.R. 541.202(f).

2. Wage and Hour has consistently reiterated that both the nature and level of the employee's decisions as they relate to the employer's business operations determine whether the employee exercises discretion and independent judgment with respect to matters of significance. "In this regard, it is not sufficient that an employee makes decisions regarding when and where to do different tasks, as well as the manner in which to perform them." WH Opinion Letter FLSA 2006-45, 2006 WL 3930478 (copy editors do not exercise discretion as to matters of significance even though they "organize work priorities to meet production deadlines set by management . . . [and] make decisions on workflow within their areas and communicate these decisions to club copywriters") (citing *Clark v. J.M. Benson Co.*, 789 F.2d 282, 287 (4th Cir. 1986)) (internal quotation marks omitted). Another Wage and Hour opinion letter from 2006, denying the application of the administrative exemption to legal analysts, provides a helpful analogous example:

> Although you state that you work independently and use your own judgment as to how to prioritize your work assignments, including how the projects will be executed and how much time

> to spend on each assignment, it is not sufficient that an employee makes decisions regarding relatively insignificant matters . . . . Nor is it sufficient that an employee makes limited decisions, within clearly "prescribed parameters." *See Dalheim v. KDFW-TV*, 706 F. Supp. 493, 509 (N.D. Tex. 1998), *aff'd*, 918 F.2d 1220 (5th Cir. 1990). Rather, there must be the exercise of discretion and independent judgment on matters of significance or consequence related to the management or general business operations of the employer or the employer's customers. For instance . . . you do not formulate or implement management policies, utilize authority to waive or deviate from established policies, provide expert advice, or plan business objectives in accordance with the dictates of § 541.202(b).

WH Opinion Letter FLSA 2006-27, 2006 WL 2792441.[13]

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[13] Wage and Hours' opinion letter on legal analysts also demonstrates that regulatory or legal limitations on an employee's exercise of discretion are, in fact, limitations that may preclude application of the administrative exemption: "In addition, most jurisdictions have strict prohibitions against the unauthorized practice of law by laypersons .... The implication of such strictures is that paralegal employees would not have the amount of authority to exercise independent judgments with regard to legal matters necessary to bring them within the administrative exemption." WH Opinion Letter FLSA 2006-27. Similarly, there are legal constraints placed on the Reps. "Since the Reps are advocating products which are routinely and closely regulated by the Food and Drug Administration (FDA), NPC prepares scripts and related materials which the Reps are expected to use to deliver a 'core message' about NPC products to each physician they visit. Reps may not go beyond the boundaries of the message crafted by NPC." *In Re Novartis* 593 F. Supp. 2d at 641.

Much like the legal analysts, Reps work independently (i.e., without direct supervision), determine what time of day to visit the physicians on their lists, and decide how best to execute their presentations within clearly prescribed parameters. This, however, similarly does not suffice to qualify for the administrative exemption; the Reps do not perform any primary duties that are largely comparable to those found in 29 C.F.R. 541.202(b), such as formulating or implementing management policies, utilizing authority to deviate from established policies, providing expert advice, or planning business objectives.[14] *Compare* WH Opinion Letter FLSA 2006-34, 2006 WL 3227789 (applying administrative exemption to community events supervisors because their authority to negotiate and bind their employers on significant matters such as negotiating contracts with vendors was sufficient to demonstrate discretion and independent judgment with respect to matters of significance); WH Opinion Letter FLSA 2006-46, 2006 WL 3930479 (location managers' primary duties, such as creating and enforcing regulations for the production crew, committing the employer in financial matters, and negotiating site rentals, in-cluded the exercise of

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[14] The cases set out in the Preamble to the 2004 Part 541 regulations to support the factors listed in 29 C.F.R. 541.202(b) clearly refer to the kind of work not engaged in by the Reps here -- making recommendations to management on policies and procedures; conducting independent investigation and resolution of issues without prior approval; having authority to waive or deviate from established policies and procedures without prior approval; developing guidebooks, manuals, and other policies and procedures for the employer or the employer's customers; negotiating on behalf of the employer with some degree of settlement authority; having authority to commit employer in matters that have financial impact. See 69 Fed. Reg. 22,143-144 (April 23, 2004).

discretion and independent judgment as to matters of significance).

3. No circuit court has addressed whether Reps are exempt administrative employees. Besides the instant case, one district court within the Second Circuit, relied upon by the district court in *In Re Novartis*, 593 F. Supp. 2d at 656-58, has concluded that the "discretion and independent judgment with respect to matters of significance" test for the administrative exemption "likely" applies to Reps because their daily decisions (which are similar to those in this case) "seek to influence prescription writing practices -- a matter of great consequence to [their employer's] business" -- and their "exercises of judgment [are] ways to drive the business [and] move market share," and because "if the doctor didn't like [the Rep], then the doctor was not going to prescribe the drug." *Amendola*, 558 F. Supp. 2d at 477. At issue in *Amendola*, however, was the plaintiff Rep's motion for discovery of the names and addresses of the pharmaceutical company's Reps, authorization for notice of the collective action to be sent to those potential plaintiffs, and equitable tolling of any claims they may file. *See* 558 F. Supp. 2d at 462. As such, the district court looked only at the "likelihood" that the pharmaceutical company would successfully argue the application of the administrative exemption to the Reps when deciding whether to grant the plaintiff's motion. *Id.* at 477.

Furthermore, the district court in *Amendola* relied in part on a 1945 Wage and Hour opinion letter which concluded that drug companies' "medical detailists" were administratively exempt. Those medical detailists, though, "were consulted with respect to individual nutritional problems encountered by hos-

pitals and physicians, such as determining whether the use of subject's product was related to the occurrence of an epidemic," and "work[ed] virtually without supervision." *Ruggeri*, 585 F. Supp. 2d at 276 (internal quotation marks omitted). In addition, the court's analysis appears to have misunderstood the "matters of significance" requirement. In commenting on "driving the business" and "market share," it blurred the distinction between an employee who exercises discretion and independent judgment related to matters of significance and one whose skillful job performance necessarily has some impact on her employer's bottom line (something undoubtedly important to the company).[15] *See, e.g., Robinson-Smith*

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[15] In addition to the decision in *Amendola*, the district court in the instant case relied heavily on another district court case, *Cote v. Burroughs Welcome Co.*, 558 F. Supp. 883 (E.D. Pa. 1982), as persuasive authority for concluding that the Reps are exempt administrative employees. In Cote, the court concluded that a Rep exercised sufficient discretion for the administrative exemption to apply because, even though she worked within a tightly-controlled marketing environment, the Rep could tailor her presentation to individual doctors in terms of her manner and the frequency of her visits and could "cultivat[e] a good working relationship with the nurses at a particular clinic and asking for their help in reminding physicians about the drug." 558 F. Supp. at 887. As a threshold matter, contrary to the district court's reasoning in *Ruggeri*, 585 F. Supp. 2d at 276, the fact that *Cote* was decided under the "old" Part 541 regulations does not vitiate its reasoning. *See* 69 Fed. Reg. 22,143 (April 23, 2004) (making the phrase "matters of significance" part of the regulatory test for the administrative exemption instead of having it as part of the Department's interpretive guidance). Nevertheless, the analysis in *Cote* fails for all the reasons set out supra. "Tailoring" one's strictly circumscribed presentations and establishing good personal working relationships do not equate to primarily performing duties requiring the exercise of discretion and independent judgment concerning matters of significance. Of course, as district court decisions, neither

v. Government Employees Insurance Co., 323 F. Supp. 2d 12, 25 (D. D.C. 2004) (noting, in the course of concluding that auto damage adjusters, who assess, negotiate, and settle automobile damage claims, travel to and from inspection sites, inspect vehicles for damage, and write estimates for repairs were not exempt, that "'the use of skill is to be clearly distinguished from work requiring discretion and independent judgment'") (quoting *Reich v. American Int'l Adjustment Co.*, 902 F. Supp. 321, 324 (D. Conn. 1994)). As noted by the Department's regulations, an employee does not exercise discretion and independent judgment related to matters of significance merely because his success (or lack thereof) in performing his duties has a financial impact on his employer's business. *See* 29 C.F.R. 541.202(f); *see also Ruggeri*, 585 F. Supp. 2d at 276 n.13 (when denying summary judgment to pharmaceutical company on the question of whether its Reps were exempt administrative employees, the court rejected the argument that the exemption applied because of Reps' impact on company's financial success). Indeed, if the "matters of significance" standard were interpreted to include any actions that in some manner "move market share" or "drive the business," it would potentially broaden the exemption to include the host of employees whose successful performance of their duties contributes in some way to the success of the company; such an interpretation would effectively swallow the "rule" requiring the payment of the

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Amendola nor *Cote* is controlling vis-à-vis this Court. *See Lombard v. Whitman*, 485 F.3d 73, 83 (2d Cir. 2007) (distinguishing between own precedent and district court decisions).

minimum wage and overtime compensation under the FLSA.[16]

4. In sum, as with the outside sales exemption, the district court's administrative exemption ruling in this case is unpersuasive in its attempt to "back-fit" the FLSA regulations into the pharmaceutical industry's practices. The facts are clear that, within the

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[16] It is worth noting that the district court in In Re Novartis did not rely upon the First Circuit's decision in Reich v. John Alden Life Insurance Company, 126 F.3d 1, 9 (1st Cir. 1997), to show that the Reps exercised discretion and independent judgment concerning matters of significance; rather, it used Alden to show that the Reps performed office or non-manual work directly related to management or general business operations. *See* 593 F. Supp. 2d at 655-58. In any event, the decision in Alden can be distinguished on its facts. In Alden, marketing representatives working for a company that designed, created, and sold insurance products (primarily for businesses that were purchasing group coverage for their employees) did not sell through direct contacts with the ultimate consumers but, rather, relied upon licensed independent insurance agents to make sales of the employer's financial products. The marketing representatives were responsible for maintaining contact with hundreds of these independent sales agents to keep them apprised of the employer's financial products, inform them of changes in prices, and discuss how the product might fit their customer's needs (they would also inform the employer of what they learned from these agents, e.g., regarding a competitor's products or pricing). The First Circuit concluded that these marketing representatives were administratively exempt. Significantly, however, the First Circuit, in concluding that the discretion and independent judgment prong was met, noted that the marketing representatives "do not use prepared scripts or read from a required verbatim statement, nor do they operate within the contours of a prescribed technique or 'sales pitch.'" *John Alden Life Ins. Co.*, 126 F.3d at 14. By contrast, the Reps in the instant case are provided with scripts, which they are required to use, to help them deliver the requisite "core message." *In Re Novartis*, 593 F. Supp. 2d at 641.

stringent restrictions on Reps' work activities, the Reps' discretion is limited to such matters as what time of day to visit a particular doctor, the manner in which to approach the doctor based on the doctor's personality, and how best to deliver (i.e., to "fit in") the NPC's "core message" for a particular drug given the time constraints of a visit. To the extent that the Department's administrative exemption regulations instruct that "[t]he phrase 'discretion and independent judgment' must be applied in the light of all the facts involved in the particular employment situation in which the question arises," *see* 29 C.F.R. 541.202(b), this guidance does not extend to ignoring the clear parameters and requirements of the regulations. *See, e.g., Kuzinski*, 604 F. Supp. 2d at 397-99. The Seventh Circuit's decision in *Kennedy v. Commonwealth Edison Co.*, 410 F.3d 365, 374-75 (2005), although analyzing the pre-2004 regulations, provides a useful comparison of what constitutes the exercise of discretion related to matters of significance within a highly regulated industry. In *Kennedy*, the Seventh Circuit concluded that, despite the heavily regulated nature of the nuclear power industry, work planners whose "job is to come up with a set of instructions that will remedy reported problems around the plant" were exempt. Even though the planners "look to past work packages for guidance and use a computer to aid their recommendations . . . [when] [f]aced with novel or not-so-novel problems, judges and Work Planners must use their independent judgment to determine how best to respond." *Id.* The work planners, although heavily regulated, thus had the discretion to develop new ways to resolve issues. The NPC Reps, on the other hand, do not have such discretion; NPC provides them with specific instructions for each aspect of their job, including

scripted responses for physician concerns, from which NPC does not permit them to deviate. They therefore should not be deemed to exercise discretion and independent judgment regarding matters of significance.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision.

Respectfully submitted,

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WILLIAM C. LESSER
Deputy Associate Solicitor

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/s/ Jennifer R. Marion
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APPENDIX H

December 8, 2009

File No. 27012

Via CM/ECF Filing

Office of the Clerk
Christina M. Koperna, Case Manager
United States Court of Appeals for the Third Circuit
601Market Street, Room 21400
Philadelphia, Pennsylvania 19106-1790

Re: *Baum* v. *AstraZeneca, LP*
Civil Action No. 3:07-cv-90 (KRG)(W.D. Pa.);
Court of Appeals Docket No. 09-2150

I write for Appellant, under Fed.R.App.P. 28(j), to advise the Court of a pertinent and significant authority following briefing in this appeal.

Central to this appeal is the applicability of the outside sales and administrative exemptions of the Pennsylvania Minimum Wage Act (PMWA) to Appellant in her pharmaceutical sales representative job for Appellee, AstraZeneca. Brief of Appellant, pp.17-36 (outside sales exemption); pp 36-50 (administrative exemption). The PMWA mirrors and is interpreted in light of the Fair Labor Standards Act (FLSA), and under each the exemptions at issue are essentially the same.

In another pending appeal raising identical issues, the US Secretary of Labor interpreted the FLSA outside sales and administrative exemptions' applicability to pharmaceutical sales representatives and found neither applied. *See In Re Novartis Wage and*

Hour Litigation, Appeal No. 09-0437 (2nd Cir.), Brief for the Secretary of Labor as *Amicus Curiae* In Support of Plaintiffs-Appellants, pp. 5-17 (outside sales exemption), 6, 17-28 (administrative exemption). The Secretary's interpretations of whether these exemptions apply, although made in an amicus brief, are controlling authority for this Court. *See Auer v. Robbins*, 519 U.S. 452, 457, 461 (1997).

Specifically, the Secretary found neither the outside sales or administrative exemptions apply to Novartis' ("NPC's") pharmaceutical sales representatives ("Reps") because:

> The Reps do not sell or take orders for NPC's drugs... The actual sale of drugs takes place between NPC and pharmacies. ...[T]he fact that the Reps do not actually "make sales" conclusively demonstrates that the position is not that of an outside salesperson consistent with the Department's legislative rules.
>
> Furthermore, when promoting the drugs to the physicians, the Reps are not permitted to deviate from the "core message" found in scripts, manuals, brochures, and other materials NPC provides them. [And for unscripted questions must] refer the physician to NPC's medical experts. These contstraints on the Reps' primary duties demonstrate that, although the Reps have some discretion... they do not exercise discretion and independent judgment with respect to matters of significance. Thus, the Reps do not qualify for the administrative exemption. (*Id*, pp.5-6.)

Appellant respectfully submits the Secretary's *amicus* brief for consideration.

Sincerely,

/s/ Joseph N. Kravec, Jr.
Joseph N. Kravec, Jr.
JNK,JR/mzc

Enclosure

Cc: James S. Urban, Esquire
(*via* CM/ECF Filing)

Matthew W. lampe, Esquire
(*via* CM/ECF Filing)

Harry I. Johnson, III, Esquire
(*via* CM/ECF Filing)

Theresia M. Moser, Esquire
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John R. Linkosky, Esquire
(*via* CM/ECF Filing)

Joseph E. Fieschko, Jr., Esquire
(*via* CM/ECF Filing)

APPENDIX I

October 30, 2009

Marcia M. Waldron
Clerk of Court
United States Court of Appeals for the Third Circuit
21400 U.S. Courthouse
60 I Market Street
Philadelphia, PA 19106-1790

Re: *Smith* v. *Johnson & Johnson*
09-1223, 09-1292

Dear Ms. Waldron:

Pursuant to Federal Rule of Appellate Procedure 280), appellant Patty Lee Smith submits the following supplemental authority.

In an appeal pending before the Second Circuit involving the exact same issues as the instant appeal -- specifically, the application of the outside sales and administrative exemption to pharmaceutical representatives -- the United States Department of Labor ("DOL") submitted a brief as *amicus curiae* setting forth its interpretations of the regulations at issue in this case. *See* Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants, *In Re Novartis Wage and Hour Litigation,* Dkt. No. 09-0437 (2d Cir. Filed Oct. 13, 2009), 2009 WL 3405861 (2d Cir. Oct. 13,2009). In its amicus brief; the DOL determined that pharmaceutical representatives are *not* exempt employees under either the outside sales or administrative exemptions. The amicus brief is significant for several reasons. First, the amicus brief is the DOL's most recent interpretation of the regulations at issue, and it is entitled to

deference based on the tenet that an agency's interpretation of its own regulations is "controlling." *Long Island Care at Home, Ltd* v. *Coke,* 551 U.S. 158, 171 (2007) (citations omitted). In *Long Island Care at Home, Ltd.,* the Supreme Court gave deference to an internal memorandum written by the DOL, which was submitted to DOL personnel only, because the Court had "no reason to suspect that [this] interpretation" is merely a "'*post hoc* rationalizatio[n]' " of past agency action, or that it "does not reflect the agency's fair and considered judgment on the matter in question." *Id* (citing *Auer* v. *Robbins,* 519 U.s. 452, 462 *(1997)). See also Kennedy v. Plan Adm'r for DuPont Sav. And Inv. Plan,* 129 S. Ct. 865, 872 (2009) (according controlling deference to position of U.S. Treasury Department set forth in *amicus* brief); *Federal Express Corp,* v, *Holowecki,* 128 S. Ct. 1147, 1155 (2008) (according controlling deference to EEOC's interpretation of regulation as expressed in its *amicus* brief, pursuant to *Auer).* Indeed, this Court has endorsed the Supreme Court's rulings that agency interpretations, even if they appear for the first time in legal briefs, are entitled to deference. *See Robert Wood Johnson Univ. Hosp.* v. *Thompson,* 297 F3d 273, 282 (3d Cir. 2002) ("Even were the Secretary's interpretation advanced for the first time in a legal brief, it would not be without force.")(other citations omitted). Thus, Plaintiff/Appellant respectfully submits that this Court must consider the DOL amicus brief when determining the outcome of the instant appeal.

Next, the same facts upon which the DOL relies in its *amicus* brief are also present here. The relevant facts concerning the outside sales exemption exist in this case. *See* 2009 WL 3405861 (citing 29 C.F.R. 541.500(a)(l)(i) and *Plaintiff/Appellant's Reply/*

Opposition Brief at pp. 4-10. Also, the facts that the DOL found compelling concerning the administrative exemption are also at hand. *See Plaintiff/Appellant's Initial Brief at* p. 9 (Plaintiff/Appellant could manage territory only within parameters established by JJ; autonomy was limited to "parameters of what company dictated; had to work within parameters prescribed by JJ when using company-provided material on visits with physicians). *See also id.* at pp. 10-11; 12-20 (Plaintiff/Appellant had to comply with numerous JJ policies such as which doctors to visit, how often to visit those doctors, and what messages she could convey to those doctors). Plaintiff/Appellant also did not formulate or implement management policies or have the ability to perform any of the functions set forth in 29 C.F.R. § 541.202(b). *Id.* at 20 (Plaintiff did not make, affect, interpret, or implement company policies; did not plan long or short-term business objectives for JJ; did not hire or fire employees, or establish budgets).

Please draw this letter to the attention of the Judges assigned to this case.

Respectfully,

/s/ Michael DiChiara
Michael R. DiChiara